Office-Supreme Court, U.S.
FILED
SEP 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-455

In the Supreme Court of the United States

OCTOBER TERM, 198__

LARRY R. MEACHUM, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

vs.

BOBBY BATTLE, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent/Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHAEL C. TURPEN
Attorney General of Oklahoma

*ROBERT A. NANCE
Assistant Attorney General
Deputy Chief, Federal Division
112 State Capitol Building
Oklahoma City, Oklahoma 73105
Tel. (405) 525-8550

Attorneys for Petitioners

August, 1983

*Counsel of Record

QUESTIONS PRESENTED

1. Whether, in an 11-year-old prison conditions of confinement case, a federal district court may refuse to permanently allow double celling and may threaten to require a return to previously ordered single celling even while finding a State is currently double celling in a constitutional fashion.

2. Whether a federal district court may, consistent with limits on its Article III jurisdiction and its equitable powers, threaten to require a return to single celling, rather than constitutional operation of double celling, as a remedy for a perceived "deterioration" of prison conditions, although the court finds conditions presently constitutional.

PARTIES TO THE PROCEEDINGS

This is a class-action proceeding in which the Plaintiff class consists of all persons confined in the institutions of the Oklahoma Department of Corrections. The United States of America is a Respondent/Intervenor in the action. The Petitioners are the Director of the Oklahoma Department of Corrections, Larry R. Meachum, and the members of the Oklahoma Board of Corrections, William E. Beckman, James Dunham, Denny Hopkins, James A. Kirk, Leroy Kirk and William McLeod. In addition, the Warden of the Oklahoma State Penitentiary, John Brown, is a party to the action.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
OPINIONS AND ORDERS BELOW	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
The Court Below Has Decided an Important Constitutional Question Implicating the Article III Jurisdiction of Federal Courts and the Equitable Limits on Their Action and Has Seriously Upset the Proper Balance of the Federal System, All in Conflict with the Decisions of This Court	12
A. The Courts Below Have Exceeded the Limits of Their Article III Jurisdiction	14
B. The Courts Below Have Exceeded the Equitable Limits Imposed on Federal Courts	19
C. The Courts Below Have Disrupted the Proper Balance of the Federal System	24
D. The Importance of Review of This Case	25
CONCLUSION	30
APPENDIX A: Order of U. S. District Court granting temporary double celling and vacating its previous Order of inmate limits (April 23, 1982).	
APPENDIX B: Order of U. S. District Court modifying dormitory requirements (Sept. 28, 1982).	
APPENDIX C: Memorandum Opinion and Orders of U. S. District Court on Motions to Stay and Enjoin Further Population Increases (Oct. 12, 1982).	

TABLE OF AUTHORITIES

Cases	PAGE(S)
Battle v. *Anderson*, 447 F.Supp. 516 (E.D. Okl. 1977)	3, 11-12, 21, 25, 26, 29
Bell v. *Wolfish*, 441 U.S. 520 (1979)	24
Dayton Board of Education v. *Brinkman*, 433 U.S. 406, (1977)	17
Hewitt v. *Helms*, ___ U.S. ___, 74 L.Ed.2d 675 (1983)	24
Los Angeles v. *Lyons*, ___ U.S. ___ (1983)	14-15, 19-20, 24
Milliken v. *Bradley*, 433 U.S. 267 (1977)	17
Newman v. *Alabama*, 559 F.2d 283 (5th Cir. 1977)	16
O'Shea v. *Littleton*, 414 U.S. 488 (1974)	15, 24
Pasadena City Board of Education v. *Spangler*, 427 U.S. 424 (1976)	22
Procunier v. *Martinez*, 416 U.S. 396 (1974)	16
Resident Advisory Board v. *Rizzo*, 564 F.2d 126 (3rd Cir. 1977)	18
Rhodes v. *Chapman*, 452 U.S. 337 (1981)	*passim*
Rizzo v. *Goode*, 423 U.S. 362 (1976)	21, 22, 24
Ruiz v. *Estelle*, 679 F.2d 1115 (5th Cir. 1982)	17, 29
Smith v. *Sullivan*, 611 F.2d 1039 (5th Cir. 1980)	16
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)	16
System Federation No. 91, Railway Employees' Department, AFL-CIO v. *Wright*, 364 U.S. 642 (1961)	23
United States v. *City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981), *cert. den.*, 456 U.S. 926 (1982)	18
United States v. *Gregory-Portland Independent School District*, 654 F.2d 989 (5th Cir. 1981)	16
Williams v. *Edwards*, 547 F.2d 1206 (5th Cir. 1977)	18

AUTHORITIES CONTINUED — PAGE(S)

United States Constitution

Eighth Amendment 2

United States Code

42 U.S.C. § 1983 ..... 2, 21, 25, 26

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 19____

LARRY R. MEACHUM, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

VS.

BOBBY BATTLE, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent/Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners (Defendants below), those officials of the State of Oklahoma charged with the management of the institutions of the Oklahoma Department of Corrections, seek a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit entered below. The case below was styled *Battle* v. *Anderson* and was decided in seven consolidated appeals on May 6, 1983.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is published as *Battle* v. *Anderson,* 708 F.2d 1523 (10th Cir. 1983). Certain relevant opinions and

orders of the United States District Court for the Eastern District of Oklahoma are unpublished but appear herein as Appendix "A" (Order of April 23, 1982), Appendix "B" (Order of September 28, 1982), and Appendix "C" (Memorandum Opinion of October 12, 1982). The Petitioners believe jurisdiction to hear this action is conferred upon this Court by 28 U.S.C. § 1254(1). The Opinion of the Court of Appeals for the Tenth Circuit was entered on May 6, 1983. The Court of Appeals denied a timely suggestion for rehearing en banc on June 6, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which states in its entirety:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In addition, this action was brought under the provisions of 42 U.S.C. § 1983, which states in its entirety:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

The Petitioners are those officials charged with the management of the institutions of the Oklahoma Department of Corrections. They are defendants in the action below and will hereinafter be referred to as Defendants or the State of Oklahoma. This designation is for convenience only, and the Defendants in no way intimate that the State of Oklahoma is a party to this action.

In 1977 the District Court ordered that prison inmates housed in cells must be given 60 square feet of floor space apiece and that inmates being housed in dormitories be given 75 square feet apiece. The court found these space requirements to be the minimum permitted by the Constitution. *Battle* v. *Anderson*, 447 F.Supp. 516, 520 (E.D. Okl. 1977). Believing these space standards to be constitutionally required and desiring to end this litigation, the Defendants stipulated in January, 1981, to a number of standards including these space requirements. The practical result of the court's order and the later stipulation of the parties was to require single celling within the institutions of the Oklahoma prison system.

Later in 1981, this Court defined for the first time the meaning of the Eighth Amendment for conditions of confinement within prisons in the case of *Rhodes* v. *Chapman*, 452 U.S. 337 (1981), holding that double celling was permissible where it did not cause the wanton and unnecessary infliction of pain. In the latter part of 1981 and continuing through the present, the population in Oklahoma's prisons has increased considerably. As a result of these population increases, the Defendants asked the District Court for au-

thority temporarily, and later permanently, to double cell and double bunk within Oklahoma's prisons consistent with the constitutional standards announced in *Rhodes*. The court conducted evidentiary hearings on this issue in December, 1981, and in April and October, 1982.

On December 8, 1981, the Defendants filed a motion seeking temporary emergency authority to double cell at least 310 cells at four of Oklahoma's newest prisons as a result of a backlog of state inmates in county jails. This motion came on for hearing before the District Court on December 22, 1981. Between the time of the filing of the motion and the hearing thereon, the District Court ordered the Corrections Director, Larry R. Meachum, and members of the Board of Corrections to show cause why they should not be held in criminal contempt as a result of certain press statements regarding overcrowding made by the Director Meachum. No prosecutor was appointed to conduct the criminal contempt proceedings until the day of the hearing on the Defendants' motion for temporary and emergency authority to double cell, when the court appointed counsel for the United States of America, Mr. Paul Lawrence, to prosecute the criminal contempt proceedings (December Tr. 35). The court decided to put the criminal contempt proceeding "on the back burner" but stated it would consider evidence on the double celling motion as well in the criminal contempt proceeding (December Tr. 40).

The Honorable George Nigh, Governor of the State of Oklahoma, testified as to his efforts to comply with the court's orders. Governor Nigh testified that he would ask the Legislature for funding for 2,650 Department of Corrections employees for Fiscal Year 1983, which represented

an increase over the 1,214 employees of the Department in 1975 (December Tr. 22). The Governor pointed out that the State of Oklahoma was the first major correctional system to be fully accredited by the American Correctional Association (December Tr. 22). Governor Nigh testified that the Department of Corrections operations budget request for Fiscal Year 1983 would be over $70 Million (December Tr. 25). Although not appearing in the record at this stage, the initial budget appropriation, later increased by the Legislature, for Fiscal Year 1983 for the Department of Corrections was $81.1 Million. The Governor pointed out the sizeable increase in the budget for the Department of Corrections since 1975 when the operational budget for the Department was $11,961,000 (December Tr. 25). The Governor pointed out that capital expenditures for the Department of Corrections from 1975 through 1983, as recommended, would be $91,706,982 (December Tr. 25). Although not appearing in the record, the Department of Corrections budget for fiscal year 1984 approves 3,562 full-time equivalent staff members in an operational budget of $98.6 Million. Also, although not appearing in the record, two of Oklahoma's prisons, the Joseph Harp Correctional Center and the Lexington Correctional Center, in the summer of 1983 passed reaudit by the American Correctional Association with very high marks.

An official of the Department of Corrections then testified that there had been limited double celling as a result of overcrowding for two days at three different facilities. However, by the time of the hearing, there was no double celling within the Oklahoma Department of Corrections (December Tr. 42, 50-51). Thereafter, the Wardens of the

four prisons at which the Defendants proposed to double cell certain cells, testified at length regarding the quality of their facilities. They testified essentially that they could accept limited double celling without violating the Eighth Amendment or curtailing existing programs for inmates. The testimony of these Wardens was targeted to compare their facilities with the Southern Ohio Correctional Facility, which had been approved by this Court for double celling in *Rhodes* v. *Chapman* (December Tr. 60-206).

At the conclusion of the hearing, the court stated that the Defendants had permission for one year to double cell at the requested units, but that if they did so such double celling would be unconstitutional and the State of Oklahoma would be fined $1,000 per day for every day during which the Defendants double celled (December Tr. 326-30). The court further found that the case of "Chapman v. Rhodes" did not apply herein because the order in this case "was made somewhat by agreement of the parties" (December Tr. 326-30). The court specifically found that double celling causes homosexuality and stated that the court could not be a party to such illegal behavior (December Tr. 331). The court dismissed the criminal contempt proceedings after hearing the evidence for temporary emergency double celling. The court later stayed the $1,000 per day fine (December Tr. 334).

As a result of continued increases in inmate population, on April 6, 1982, the Defendants filed a motion for immediate and permanent modification of the court's orders prohibiting double celling. In that motion the Defendants asked for permanent authority to double cell Oklahoma's penal institutions consistent with this Court's decision in

Rhodes v. *Chapman*. This motion came on for hearing on April 23, 1982.

At the hearing on the permanent double celling motion, the Defendants admitted into evidence an affidavit of Superintendent Ronald C. Marshall of the Southern Ohio Correctional Facility (SOCF) at Lucasville, Ohio, the prison approved for double celling by This Court in *Rhodes* v. *Chapman*. This affidavit and the attached photographs compared SOCF with the Conner Correctional Center, the Lexington Correctional Center, the Joseph Harp Correctional Center and the Mabel Bassett Correctional Center in Oklahoma. Attached to this affidavit were affidavits of the then-Wardens of these Oklahoma prisons. Based upon personal inspection, Superintendent Marshall testified that these Oklahoma prisons met or exceeded the standards found in his own institution. See Defendants' Exhibit 2, admitted April Tr. 40. Superintendent Marshall gave live testimony at the April 23, 1982 hearing regarding his inspection of the remaining six Oklahoma institutions and photographs of those institutions were admitted into evidence (April Tr. 42-65). Superintendent Marshall testified in substance that Oklahoma's prisons were as good or better than the Southern Ohio Correctional Facility, which was the subject of *Rhodes* v. *Chapman*. Corrections Director Larry R. Meachum, testified after Superintendent Marshall that, if given authority to double cell consistent with constitutional standards, he would double cell new institutions first (April Tr. 58).

At the conclusion of the April 23, 1982 hearings, the court granted the Defendants indefinite, but not permanent, authority to double cell consistent with constitutional standards. See order of April 23, 1982, Appendix "A" hereto.

The court's action left the spectre that, at a later date, the Defendants might be ordered to return to single celling while double celling consistently with constitutional standards.

On September 29, 1982, as a result of a letter written by Corrections Director Larry R. Meachum, the District Court entered an order clarifying its previous orders and permitting the Defendants to double bunk in open bay dormitories consistent with constitutional standards. See Appendix "B" hereto. In reaction to this order, on Friday, October 1, 1982, the Plaintiffs served by hand, motions to stay and vacate the double bunking order and to place a population cap on Oklahoma's prisons. The court set these emergency motions for hearing on Monday, October 4, 1982. At that hearing, the court's Fact Finder served as Plaintiffs' expert witness in opposition to double bunking.

While the Defendants were informed that the Plaintiffs would be filing a motion, they did not have notice of the actual nature of that motion until it was filed by hand on October 1, 1982. Counsel for the Defendants was out of town on that day and did not read the motion until the next day, Saturday, October 2, 1982. The court had scheduled the hearing on Plaintiffs' Motion for Monday morning, October 4, 1982. At the time of the hearing the Defendants objected to hearing so important a motion on short notice and further objected to the hearing for reason that the District Court did not have jurisdiction to grant the relief sought in light of the then-pending appeals (October Tr. 18-19). After hearing the Plaintiffs' opening statement, the defense counsel had to ask leave of the court to make an opening statement on behalf of the Defendants; and the

court made it clear that it planned only to hear evidence during the morning of October 4 (October Tr. 18).

The court's Fact Finder, John Albach, served as Plaintiffs' expert witness during the hearing. The District Court would not permit the Defendants to question Plaintiffs' expert on the disproportionality of conditions within Oklahoma's prisons to the crimes for which the inmates had been convicted (October Tr. 76-77). The Defendants noted to the court that the disproportionality of conditions to crimes committed was one of the Eighth Amendment factors approved in *Rhodes* v. *Chapman* (October Tr. 77). *See, Rhodes,* 452 U.S. at 347. The trial court further would not permit the Defendants to question the Plaintiffs' expert on his disagreement with this Court's decision in *Rhodes* (October Tr. 87-88). However, in December, 1981, the court's Fact Finder had previously testified regarding his opposition to the *Rhodes* case (December Tr. 325). The Fact Finder's testimony regarding sanitary problems consisted of his own lay opinion of the cause of stomach flu during winter months unsupported by medical professionals or medical records (October Tr. 73-75). The Fact Finder did testify that he had no way to tell whether conditions in Oklahoma's prisons were disproportionate to the contemporary standards of public decency in Oklahoma because the Fact Finder is not an Oklahoma resident (October Tr. 78).

Corrections Director Larry Meachum testified that the Department was fully staffing the control rooms of its institutions with one correctional officer in each control room at all times. The Director further testified that the Department of Corrections would be able to continue this staffing

in the future (October Tr. 105-08). The Director also explained that he had approached the Contingency Review Board, consisting of the Governor, the Speaker of the State House of Representatives and the President Pro Tempore of the State Senate, to seek authority for 254 or 274 additional full-time equivalent employees (October Tr. 110). Director Meachum also testified that the Department was providing inmates with adequate food, clothing, medical care and sanitation. With additional work and assistance from the Contingency Review Board and Legislature, the Director testified, the Department could provide adequate security and programs (October Tr. 138-40). Director Meachum explained to the court steps which had been taken and which would continue to be taken to correct deficiencies in fire marshall reports at the McLeod Correctional Center, the Oklahoma State Penitentiary Trusty Building, the Oklahoma State Reformatory, the Ouachita Correctional Center and the Stringtown Correctional Center (October Tr. 101-04). Director Meachum testified that the Department had received an additional 43 full-time equivalent employees for programs and to combat inmate idleness (October Tr. 127-28). The Director also testified that the Department was considering permitting inmates from the minimum security unit at the Jess Dunn Correctional Center to become employed in the nearby City of Muskogee, Oklahoma. Further, the Department was considering permitting Jess Dunn inmates to attend vocational and technical school in Muskogee. Also, the Department was considering longer-range plans to permit inmates to work for the Department of Transportation or the State Department of Parks and Recreation (October Tr. 109). Director Meachum testified that roughly 3,000 inmates were then involved in programs, ex-

clusive of those inmates who were employed. He further testified that perhaps 5,000 inmates could be involved in programs by March, 1983, exclusive of those who worked (October Tr. 130-31).

Director Meachum further explained that the Department had changed its criteria for written serious incident reviews of the use of force within prisons or of inmate-inmate altercations. This changed criteria, rather than necessarily any additional use of force, accounted for the increased numbers of S.I.R. reports (October Tr. 132-33).

For the convenience of the Court, Judge Barrett's opinion below summarizes the factual record presented to the District Court. *Battle* v. *Anderson*, 708 F.2d 1523, 1530-36 (10th Cir. 1983).

Based on the 71 pages of testimony by the court's Fact Finder, the court found the entire Oklahoma prison system threatened to become unconstitutional once again. Based upon this finding, the court ordered the Defendants to prepare a plan to return to their single-celling stipulations even while finding the prison system to be presently constitutional. See Appendix "C" hereto.

All three members of the Court of Appeals panel hearing these consolidated appeals found conditions within the Oklahoma Department of Corrections to be constitutional within the meaning of *Rhodes* v. *Chapman*. *Battle*, supra, 708 F.2d at 1537. The panel majority held that the District Court should keep jurisdiction until it was assured that Eighth Amendment violations would not recur and stated that the focus of judicial inquiry was not particularized in discrete events, but rather social conditions which threaten important constitutional values and the organizational dy-

namics that create and perpetuate that condition. *Id.*, 708 F.2d at 1537-38. The panel majority went on to hold that the District Court's order requiring a plan of action describing measures to be used to avoid a return to unconstitutional prison conditions and a date of compliance with the single-celling stipulations was within the proper scope of the District Court's authority and affirmed that order in full. *Id.*, 708 F.2d at 1540. Thus, the Court of Appeals sanctioned a forced return to single celling as a remedy for possible future unconstitutionality of conditions while double celilng.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IMPLICATING THE ARTICLE III JURISDICTION OF FEDERAL COURTS AND THE EQUITABLE LIMITS ON THEIR ACTION AND HAS SERIOUSLY UPSET THE PROPER BALANCE OF THE FEDERAL SYSTEM, ALL IN CONFLICT WITH DECISIONS OF THIS COURT.

Oklahoma is the first State in the Nation to have a prison system which is fully accredited by the American Correctional Association. Only the State of Utah, with a single institution, was accredited before Oklahoma. The District Court and all three members of the Court of Appeals panel hearing this case concede that conditions within the Oklahoma prison system are constitutional. Yet, these Defendants face the spectre of a court-ordered return to single celling despite their demonstrated ability to double cell Oklahoma's prisons constitutionally and consistent with rulings of this Court. Based upon its unfounded fear that

unconstitutional conditions threatened, the District Court ordered the Defendants to prepare to return to single celling. The Defendants believe the proper remedy for the perceived "deterioration" of conditions within Oklahoma's prisons while double celling is specific orders directed to those factors which might become unconstitutional rather than a blanket order to return to single celling while at the same time finding conditions to be constitutional.

To put this case in context, in October, 1982, after considerable double celling, the District Court still found Oklahoma's prisons to be constitutional, although in a state of "deterioration." Therefore, in its earlier single-celled condition ordered by the District court in 1977, the Oklahoma prison system was in a condition far above that actually required by the Constitution. It is this superior state that the district court sought to reimpose on the defendants, with the approval of the Court of Appeals. Although the District Court has yet to take that final step, it could do so at anytime and Defendants would only have recourse to this Court.

This case presents an important opportunity for this Court to outline the proper Article III jurisdiction of federal courts and the proper limits on their equitable powers in prison cases for the benefit of the Tenth Circuit Court of Appeals and other federal courts. The decision of the court below permits virtually unlimited discretion on the part of federal courts in continuing their remedial jurisdiction in prison cases even after constitutional conditions have been achieved in prisons. The proper limits on federal court involvement in prison litigation is important because over 30 states currently have some form of federal court

supervision over institutions within their prison systems. Such federal court supervision is relatively easy to achieve by demonstrating some condition which violates the constitutional rights of inmates. However, under the theory adopted by the court below, that federal court intervention will be very difficult to end because the court below sanctioned continued federal court supervision and use of extra-constitutional remedies even while conceding the State was operating its prison system in a constitutional fashion. This holding seriously disturbs the balance in the federal system as articulated by opinions of this Court. The balance of state and federal authority within the federal system is a question of national importance and is not limited merely to the rights and obligations of the parties to this action. This case is further important because it calls upon this Court to properly limit the discretion of the Federal District Court in ordering a return to single celling which could potentially cost the State of Oklahoma staggering sums of money even though the State of Oklahoma is operating its prison system with double celling in a constitutional fashion.

A. The Courts Below Have Exceeded the Limits of Their Article III Jurisdiction.

This Court has recently reaffirmed that a plaintiff must demonstrate a personal stake in the outcome of litigation in order to meet Article III requirements for federal court jurisdiction. In *Los Angeles* v. *Lyons*, ... U.S. ..... (1983), this Court stated:

> ". . . The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct

> and the injury or threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical.' . . ." 75 L.Ed.2d at 684.

This Court has made clear that abstract injury is not enough to support Article III jurisdiction of federal courts because the plaintiff must allege that he has sustained or is immediaetly in danger of sustaining some direct injury as a result of the challenged conduct. *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974). This Court has made clear that past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing present adverse effects. *Id.,* 414 U.S., at 495-96.

This Court has announced the standard for constitutionality of prison conditions under the Eighth Amendment in the case of *Rhodes* v. *Chapman,* 452 U.S. 337 (1981). In that case this Court set the general standard for double celling and conditions of confinement as follows:

> "These principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions other than those in Gamble and Hutto, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in Gamble, 429 US, at 103-104. But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." 452 U.S. at 347.

Thus, it is clear that only the wanton and unnecessary infliction of pain or a direct and immediate threat of the infliction of such pain justifies continued federal intervention in the operation of Oklahoma's prisons.

This Court has made it clear that federal courts should intervene in the day-to-day operation of state penal and detention systems only with the greatest of reluctance. *Procunier* v. *Martinez*, 416 U.S. 396, 404-05 (1974). Further, in seeking to define even in broad and general terms how far the remedial powers of federal courts extend, it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. *See, Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *United States* v. *Gregory-Portland Independent School District*, 654 F.2d 989, 1006 (5th Cir. 1981). Where no constitutional deprivation is established, the justification for federal judicial intervention evaporates. *Smith* v. *Sullivan*, 611 F.2d 1039, 1044-45 (5th Cir. 1980). While constitutional standards must be scrupulously observed,

> ". . . It does mean in the prison context that federal courts should keep their eyes on the main objective, the Eighth Amendment command for the eradication of cruel and unusual punishment. . . ." *Newman* v. *Alabama*, 559 F.2d 283, 287 (5th Cir. 1977).

Indeed, in the *Rhodes* case, supra, this Court was careful to state that in deciding questions involving the Eighth Amendment, courts must bear in mind that their inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility. *Rhodes*, supra, 452 U.S. at 351. In *Rhodes* the Court found there

was no constitutional violation. There being no constitutional violation, this Court held the district court *had no authority* to consider whether double celling was the best response to the increase in prison population. *Id.*, 452 U.S. at 351.

In another context, this Court has stated:

> ". . . Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see Pasadena Bd. of Education v Spangler, 427 US 424 (1976) or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in Milliken I, supra. Hills v Gautreaux, 425 US 284, 292-296 (1976). . . ." *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977).

Likewise, this Court in the same year stated:

> ". . . The power of the federal courts to restructure the operation of local and state governmental entities 'is not plenary. It "may be exercised 'only on the basis of a constitutional violation.' " 418 US, at 738, quoting Swann v Charlotte-Mecklenburg Board of Education, 402 US 1, 16. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' 418 US, at 744, Swann, supra, at 16, Id., at 293-294. See also Austin Independent School Dist. v United States, 429 US 990, 991 (1976) (Powell, J., concurring)." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419-20 (1977).

The Fifth Circuit recently recognized a similar principle in the case involving the Texas Department of Corrections. *See, Ruiz* v. *Estelle*, 679 F.2d 1115, 1145 (5th Cir. 1982) (the

nature of the violation determines the scope of the remedy). *See also, United States* v. *City of Parma, Ohio,* 661 F.2d 562, 576 (6th Cir. 1981), *cert. denied,* 456 U.S. 926 (1982); *Resident Advisory Board* v. *Rizzo,* 564 F.2d 126, 145 (3rd Cir. 1977); *Williams* v. *Edwards,* 547 F.2d 1206, 1211-12 (5th Cir. 1977).

If the Article III jurisdiction of federal courts is tied to remedying constitutional violations only, the court below has gone too far. The Defendants believe the District Court's condemnation of the entire Oklahoma prison system at a hearing held on three days' notice and based upon only 71 pages of transcript, was both unfair and factually unfounded. However, even taking at face value the District Court's factual finding that unconstitutional conditions once again threatened with the Defendants' system of double celling, the proper remedy tailored to the threatened constitutional violation would be to require the Defendants to take steps to assure that constitutional conditions under double celling could be maintained. The District Court erred in retaining authority to impose single celling upon the Defendants even though finding their operations constitutional in April, 1982. The District Court further erred in ordering them to prepare a plan to return to single celling although finding their operations still constitutional in October, 1982. The Court of Appeals seriously erred by affirming those orders based upon the District Court's finding of potential unconstitutional conditions in the future. The courts below exceeded their Article III jurisdiction by sanctioning the return to single celling as a response to potential constitutional violations in the future. Staking out that authority went far beyond tailoring the scope of the remedy to fit the nature and extent of a potential constitutional violation.

B. The Courts Below Have Exceeded the Equitable Limits Imposed on Federal Courts.

This Court has established certain equitable limits on the exercise of injunctive power by federal courts. Recently, in *Los Angeles* v. *Lyons*, supra, this Court stated:

> ". . . If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October, 1976, then he has not met the requirements for seeking an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice.
>
> * * *
>
> ". . . The equitable doctrine that cessation of the challenged conduct does not bar an injunction is of little help in this respect, for Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued." 75 L.Ed.2d at 688-89.

In the same case, this Court went on to state:

> "We decline the invitation to slight the preconditions for equitable relief; for as we have held, recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate. O'Shea, 414 US, at 499, Younger v Harris, 401 US 37, 46 (1971). Mitchum v Foster, 407 US 225, (1972) held that suits brought under 42 USC § 1983 are exempt from the flat ban against the issuance of injunctions directed at state court proceedings, 28 USC § 2283. But this holding did not displace the normal principles of equity, comity and federalism that should

> inform the judgment of federal courts when asked to oversee state law enforcement authorities. In exercising their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' Stefanelli v Minard, 342 US 117, 120 (1951); O'Shea v Littleton, 414 US, at 500. See also Rizzo v Goode, 423 US, at 380, Cleary v Bolger, 371 US 392 (1963); Wilson v. Schnettler, 365 US 381 (1961); Pugach v Dollinger, 365 US 458 (1961). The Court of Appeals failed to apply these factors properly and therefore erred in finding that the District Court had not abused its discretion in entering an injunction in this case." 75 L.Ed.2d at 690-91.

The Defendants concede that their predecessors once ran a prison system which was unconstitutional in some respects. However, that is no longer the case because, as both courts below recognized, the Oklahoma prison system is currently constitutional. The District Court's finding that unconstitutional conditions threatened, based upon 71 pages of transcript, is clearly erroneous, particularly in light of the rapid turn-abouts performed by the District Court in its factual findings. In December, 1981, the District Court found that double celling in Oklahoma's prisons would be unconstitutional, but it permitted the temporary double celling of 310 cells. Four months later, in April, 1982, after those 310 cells had been double celled, the District Court found that double celling in Oklahoma's prisons was constitutional. Six months after that, in October, 1982, the District Court found the prison system constitutional once again, but that unconstitutional conditions threatened based upon the testimony of its Fact Finder acting as Plaintiff's

expert witness testifying for 71 pages of transcript. The same Fact Finder is previously on the record under oath disagreeing with this Court's opinion in *Rhodes* v. *Chapman* (December Tr. 325). Interestingly enough, in the ten months which have transpired since the District Court's October hearing, the Plaintiffs have made no effort to seek emergency relief from the infliction of the unconstitutional conditions which they predicted in October. The Defendants urgently request this Court to review the factual record to determine whether or not the factual finding of impending unconstitutional conditions is a justified exercise of the discretion of the District Court.

Additionally, the Defendants believe the courts below have seriously erred because they have explicitly approved an ordered return to single celling in an action based upon 42 U.S.C. § 1983. This Court has stated of that statute in *Rizzo* v. *Goode*, 423 U.S. 362 (1976):

> ". . . The plain words of the statute impose liability — whether in the form of payment of redressive damages or being placed under an injunction — only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." 423 U.S. at 371, 372.

However, footnote 5 to the majority opinion of the Court of Appeals explicitly recognizes that the Court of Appeals was sanctioning a return to single celling whose "provisions may be adjusted in the future in light of the totality of the circumstances without compromising constitutional standards." *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983) n.5. The Court of Appeals in the same footnote went on to state that, given the "declining" conditions in Oklahoma's prisons, although those conditions were not found to

be unconstitutional, it was proper to retain, for the present, the obligation of eventual single celling. *Id.*, 708 F.2d at 1540 at n.5. It appears quite clear that the Court of Appeals considered it proper to require single celling where prison conditions were less comfortable than they once were but where prison conditions were still constitutional. This is a clear-cut violation of the equitable authority of federal courts and is, further, beyond the statutory language of § 1983 as defined by this Court in *Rizzo* v. *Goode*, supra.

In a similar case dealing with the compliance phase of federal court remedial orders, this Court in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), held that a district court exceeded its authority in requiring an annual racial rebalance of public schools once a racially neutral attendance system had been established. *Id.*, 427 U.S. at 434, 435. This Court went on to state that the district court had fully performed its remedial function once the racially neutral attendance system was initially implemented and was not entitled to require the school board to annually rearrange its attendance zones to meet a fixed racial mixture. *Id.*, 427 U.S. at 436-37. This Court went on to state that the district court had abused its discretion in failing to modify its prior orders because of changed conditions of facts within the school system. This current round of litigation began in the District Court with attempts by the Defendants to secure modification of the District Court's single celling orders as a result of this Court's opinion in *Rhodes* v. *Chapman* and the increasing prison population in the State of Oklahoma.

In a case very similar to the one at hand, this Court permitted modification of a consent decree enjoining certain

labor practices. In *System Federation No. 91, Railway Employees' Department, AFL-CIO* v. *Wright*, 364 U.S. 642 (1961), the Court reversed the district court and Court of Appeals for abuse of discretion for failing to modify a consent decree against a union shop after the labor laws had changed to permit a union shop. The Court noted that in considering such requests the trial court must balance the policy of res judicata against the right of a litigant to apply for changed relief under changed conditions of law. *Id.*, 364 U.S. at 647-48. The Court went on to note that the parties cannot, by giving each other consideration, purchase a continuing injunction where that injunction has been an instrument of wrong. *Id.*, 364 U.S., at 651.

The Defendants believe that the District Court and the Court of Appeals abused their discretion in failing to modify the District Court's original single celling order to conform with this Court's ruling in *Rhodes* v. *Chapman* and in light of the increasing prison population in the State of Oklahoma. Failure of the courts below to require modification of the District Court's prior orders puts these Defendants in the position of being threatened with a requirement to single cell their prisons when such measures are not required by the Constitution and while they are operating under double celling in a constitutional fashion. The Defendants believe that these requirements exceed the proper equitable limits on injunctive authority of federal courts and disrupt the proper balance of authority between elected and appointed state officials and the federal judiciary.

C. The Courts Below Have Disrupted the Proper Balance of the Federal System.

This Court has clearly stated that corrections officials must be given the discretion and latitude to handle matters of correctional policy in the absence of a federal court finding of constitutional violations. *Hewitt* v. *Helms*, ... U.S. ....., 74 L.Ed.2d 675, 685-86 (1983); *Rhodes* v. *Chapman*, 452 U.S. 337, 349 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 547-48 (1979). This Court has counselled special restraint in the use of federal equitable power when courts are called upon to enjoin the operation of criminal justice systems. *Los Angeles* v. *Lyons*, ... U.S. ....., 75 L.Ed.2d 675, 691 (1983); *Rizzo* v. *Goode*, supra, 423 U.S. at 379; *O'Shea* v. *Littleton*, supra, 414 U.S. at 499. This Court most succinctly stated the principle as follows:

> ". . . But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government." *Bell* v. *Wolfish*, 441 U.S. at 562.

When the Court of Appeals sanctioned a forced return to single celling while simultaneously admitting that single celling requirements could be adjusted without compromising constitutional standards, the Court of Appeals entered

into the realm of "judgment calls" reserved by this Court to state officials. See *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983). Adopting for itself the authority to make those "judgment calls" disrupted the proper balance of the federal system in violation of this Court's clear holdings to the contrary.

D. The Importance of Review of This Case.

If the court below had merely made an erroneous interpretation of law or fact, the Defendants would not ask this Court to review it. However, the court below has erred in its opinion in a way which is so fundamentally at variance with the rulings of this Court and in a way which has such wide-spread implications for these parties and for over 30 States, that review and reversal is necessary to correct the errors below. Therefore, these Defendants believe that review by this Court is imperative.

It is important for this Court to return the Court of Appeals to the proper boundaries of Article III jurisdiction and to the proper exercise of the federal courts' equitable injunctive authority. There is no case or controversy within the meaning of Article III where there is no constitutional violation present. Nor is there any claim under 42 U.S.C. § 1983 because that statute only applies to situations in which a person is being deprived of a constitutional right under color of state law. Both the District Court and the Court of Appeals have conceded that conditions within Oklahoma's prisons are constitutional. Since the hurried and abbreviated hearing before the Distirct Court in October, 1982, the Plaintiffs have sought no relief in the District Court alleging current unconstitutional conditions. There-

fore, this Court should discount their dire predictions of unconstitutionality made in October of last year.

Because the Defendants are operating the prison system under a regime of double celling within constitutional limits, the Plaintiffs have no standing to demand single celling because they are suffering no present, real and immediate constitutional injury. The Court of Appeals ruling explicitly sanctions continued stringent federal court intervention in the operation of Oklahoma's prisons by permitting the forced return to single celling while simultaneously admitting that double celling does not compromise constitutional standards. *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983) n.5. This ruling of the Circuit can only serve to distort the course of constitutional litigation in the five States comprising the Tenth Circuit. The profound effect of the Court of Appeals ruling will, therefore, be felt far beyond the relations between the parties to this action. It is vitally important for this Court to articulate the standards for termination of federal court jurisdiction in prison litigation because over 30 states have at least part of their prison systems under some form of federal court order. These various orders seek to remedy constitutional violations within prisons in their respective states. These orders are entered relatively easily under 42 U.S.C. § 1983 because of the relative ease of proving at least *some* constitutional right has been violated under color of state law within any given prison system. However, there is relatively little authority on what is required to terminate or limit federal court jurisdiction over prison systems once constitutional compliance is achieved. As these various states achieve the remedial objectives of federal courts, both the courts and

the parties need guidance on what is necessary to end or limit federal court jurisdiction over prison systems. After 11 years of litigation and over $400 Million in capital and operational spending for prisons in the State of Oklahoma and after full accreditation by the American Correctional Association, it would seem that the Defendants herein should easily be permitted to double cell consistent with this Court's opinion in *Rhodes* v. *Chapman*. However, that is not the case under the opinion of the Court of Appeals. If the opinion of the court below is adopted by federal courts in other states and Circuits, courts everywhere will struggle with the question of exactly what level of constitutional compliance is required for what period of time in order to justify a cessation of federal court control.

It is important for this Court to redress the proper balance in the federal system which is disrupted by the opinion of the court below. This Court has clearly stated that federal courts cannot assume state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system. *Rhodes* v. *Chapman,* 452 U.S. at 352. Indeed, the Oklahoma Legislature and the Oklahoma Department of Corrections have built a model correctional system which continues to be accredited by the American Correctional Association. It can harly be said that officials of the State of Oklahoma, including the Governor who testified before the District Court, are insensitive to the requirements of the Constitution. Yet, the courts below have imposed their judgment of what is required for running a prison system on the Defendants even while the Defendants

are operating the Oklahoma prison system in a constitutional fashion. The courts below have deprived the Oklahoma Legislature, the State's Governor and Oklahoma correctional officials of the authority to make necessary and legitimate "judgment calls" based upon a mere fear of possible future unconstitutionality based upon a mere 71 pages of transcript testimony taken at a hearing called on three days' notice. The actions of the courts below have caused a substantial portion of the legitimate functions of state government in Oklahoma to be transferred to the virtually unrestricted discretion of the District Court. That court now has authority to order a return to single celling even though no unconstitutional conditions exist within the Oklahoma prison system.

Federal court intervention is appropriate in state affairs where state democratic processes fail to protect the rights of some segment of the population. The Defendants concede that at the inception of this lawsuit conditions within some of Oklahoma's prisons were unconstitutional. However, since that time, and partially as a result of the actions of the District Court herein, Oklahoma has built one of the finest prison systems in the nation. The Oklahoma prison system is conceded to be constitutional by both the District Court and the Court of Appeals. Having done so, the authority to manage that prison system should shift from the federal courts back to the properly constituted authorities of the State of Oklahoma. These authorities should be permitted to double cell Oklahoma's prisons within the meaning of this Court's opinion in *Rhodes* v. *Chapman* without federal court intervention because such intervention is a remedy for the default of state officials and is not a substitute for proper democratic state government.

Beyond the implications for the federal system nationwide found in the Court of Appeals' opinion, the resolution of this question is important to the parties to this action and to the State of Oklahoma. As noted above, footnote 5 to the majority opinion of the Court of Appeals essentially gives the District Court unrestricted discretion to require single celling even where such single celling is clearly not required by the Constitution. See *Battle* v. *Anderson*, 708 F.2d 1523, 1540 (10th Cir. 1983). Therefore, the District Court could require the staggeringly expensive remedy of single celling where there is no violation of a cognizable constitutional right of the Plaintiff class. To put this in perspective, a modern 400-cell prison similar to the Joseph Harp Correctional Center would cost $25-30 Million to build at current prices, including the cost of land acquisition. In *Ruiz* v. *Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982), the Fifth Circuit found that newly built maximum security prison cells cost between $30,000 and $60,000 apiece. If the Defendants are required to build an additional 1,200 cells to accommodate inmates currently double celled, the cost could therefore run into tens if not hundreds of millions of dollars. Even less expensive methods of construction are staggeringly expensive. Given the current state of affairs in state finance both in Oklahoma and throughout the Nation, a requirement to single cell in excess of constitutional standards could cripple state economies.

The District Court herein began the *Battle* litigation before this Court's decisions in *Bell* v. *Wolfish*, *Rhodes* v. *Chapman* and *Hewitt* v. *Helms* were handed down. In many respects, this case is one of the earliest forerunners of modern prison litigation. The District Court was forced

to find its own way in many of its rulings without definitive appellate court guidance. As a result, the Defendants herein live under District Court decrees which in many respects are far more liberal and intrusive than could be sanctioned under pertinent Supreme Court rulings. It is essential for the Defendants and for the State of Oklahoma that this Court grant certiorari and reverse the rulings of the courts below in order to modify the outdated rulings and excessively broad interpretations of federal court jurisdiction and equitable powers embodied in the rulings of the courts below.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

MICHAEL C. TURPEN
Attorney General of Oklahoma

ROBERT A. NANCE
Assistant Attorney General
Deputy Chief, Federal Division
112 State Capitol Building
Oklahoma City, Oklahoma 73105
Tel. (405) 525-8550

Attorneys for Petitioners

August, 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed April 23, 1982]

BOBBY BATTLE, et al., a Class Action, Plaintiffs, and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor, v.	)	No. 72-95-C
PARK ANDERSON, et al., Defendants.	)	

ORDER

Now on this 23rd day of April, 1982, this matter comes on for hearing on Defendants' Motion for Immediate and Permanent Relief from Prohibition Against Double-Celling. Plaintiffs are represented by their attorneys of record, Louis W. Bullock and Carl Stevens. Mr. John Green, Assistant United States Attorney, appears for Plaintiff-Intervenor, United States of America. Defendants are represented by Assistant Attorneys General Robert A. Nance, Charles S. Rogers, and John E. Douglas. Oklahoma Department of Corrections staff counsel Michael Avant-Pybas is also present. After taking evidence and hearing argument of counsel and being advised of the premises, the Court makes the following findings of fact, conclusions of law, and order.

1. The Court finds and holds that the Defendants should have and do hereby have the authority indefinitely but not permanently to double-cell where necessary. This Court's Order of January 12, 1982, is hereby vacated in part to permit indefinite double-celling throughout the Oklahoma Department of Corrections consistent with constitutional requirements. The Court's previous order setting a

limit of 500 inmates per institution is also hereby vacated. Therefore, Defendants' Motion is sustained to the extent of permitting indefinite double-celling, but overruled to the extent of denying permanent double-celling.

Exceptions to all parties. So ordered this 23rd day of April, 1982.

(s) *Luther Bohanon*
LUTHER BOHANON
United States District Judge

Approved as to Form Only:

LOUIS W. BULLOCK
Sobel, Bullock & Stevens
City Plaza West, Suite 404
717 South Houston
Tulsa, OK 74127
ATTORNEYS FOR PLAINTIFFS

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA
(s) *Robert A. Nance*
By ROBERT A. NANCE
ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, OK 73105
ATTORNEYS FOR DEFENDANTS

MICHAEL AVANT-PYBAS
Chief Staff Attorney
Oklahoma Department of Corrections
3400 North Eastern
Oklahoma City, OK 73111

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed September 28, 1982]

BOBBY BATTLE, et al., Plaintiffs,	)	
and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	
vs.	)	No. 72-95-CIV
PARK ANDERSON; LARRY MEACHUM, DIRECTOR, DEPT. OF CORRECTIONS; BOARD OF CORRECTIONS FOR THE STATE OF OKLAHOMA and Members Thereof, et al., Defendants.	)	

MODIFICATION OF DORMITORY REQUIREMENTS

This court received a request on July 20, 1982, from the Oklahoma Department of Corrections to specifically modify certain remedial orders requiring the housing of inmates in a space of at least seventy-five (75) square feet if housed in dormitories. Plaintiffs responded to this request on July 28, 1982, by emphatically opposing such measures based on the objections of security, privacy, disease, and lack of sufficient evidence to justify such relief.

On September 23, 1982, the impartial fact finder, John Albach, responded to a court request for his views on this issue in light of recent compliance inspections. He concluded that the safe execution of increasing the dormitory population is unproven due to the severe pressures on the system at this time. He further projected that the granting of this relief "could put the system back almost where it was in 1973."

[APPENDIX]

On September 27, 1982, the Department of Corrections in a letter from Director Larry R. Meachum explained the current need for relief and requested court action.

Therefore, the court after consideration of all views presented by the parties and in light of the evidence presented, hereby finds and orders that the defendants have the authority to increase the dormitory population where necessary and where it can be accomplished within constitutional requirements for an indefinite period.

Exceptions taken by all parties continue.

Dated this 28th day of September, 1982.

(s) *Luther Bohanon*
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed October 12, 1982]

BOBBY BATTLE, et al., Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. PARK ANDERSON; LARRY MEACHUM, DIRECTOR, DEPT. OF CORRECTIONS; BOARD OF CORRECTIONS FOR THE STATE OF OKLAHOMA and Members Thereof, et al., Defendants.	)	No. 72-95-CIV

MEMORANDUM OPINION AND ORDER ON MOTIONS TO STAY AND ENJOIN FURTHER POPULATION INCREASE

Plaintiffs' motion to stay implementation of the court's order as to double bunking dated September 27, 1982, came on for hearing on October 4, 1982. Plaintiffs' concurrent emergency motion for the enjoining of further population increases in the Oklahoma prison system was also considered. The plaintiff class was represented by Louis W. Bullock. Defendants were represented by Assistant Attorney General Robert Nance for the State of Oklahoma and Michael Avant-Pybas as counsel for the Oklahoma Department of Corrections.

Wherefore, plaintiffs' motion to stay and enjoin further population increases having come on for consideration and the court having reviewed the evidence presented, authority cited, and being otherwise fully advised of the premises, finds the motions are not well taken and should be denied.

Motion to Stay

The argument that must be advanced by the plaintiff to succeed in the issuance of a stay must be structured on the following factors:

1. Harm to the petitioner
2. Harm to the respondent
3. Harm to the public interest; and
4. Likelihood of success of petitioner on the merits, *National Indian Youth Council* v. *Andrus*, 623 F.2d 694 (10th Cir. 1980); *Battle* v. *Anderson*, 564 F.2d 383 (10th Cir. 1977).

The court will organize the opinion following those four guideline considerations. However, a preliminary issue must be addressed before proceeding with this analysis.

The plaintiffs propound the argument that the District Court has an obligation to supervise implementation of adjudicated remedial action and a failure to strictly enforce established remedial measures would in effect violate the "Law of the case." The plaintiffs argue in their motion that the injunction heretofore issued should not be modified absent a showing that the injunctive relief has been altered by circumstances so that it is now an instrument of wrong. No authority was cited for this position, but the argument is similar to language used by the Supreme Court in *United States* v. *Swift & Company*, 286 U.S. 106 (1932). If the court is correct in interpreting the nature of this argument as one based on the general principles of the *Swift & Company* case, then the position advanced has no merit. A similar argument was unpersuasively advanced in *Nelson* v. *Collins*, 659 F.2d 420, 423 (4th Cir. 1981), a case factually similar to the one before this court. The *Nelson* court determined that in situations where the prison population increased at an unprecedented rate and where the remedial orders were issued prior to the specific guidance furnished

by the Supreme Court in *Bell* v. *Wolfish*, 441 U.S. 520 (1979) and subsequently in *Rhodes* v. *Chapman*, 452 U.S. 337 (1981), the necessary elements were present to permit modification of a "continuing decree . . . directed to events to come . . . [involving] the supervision of changing conduct or conditions." 659 F.2d at 424.[1]

The Tenth Circuit has implicitly approved this analysis when it permitted earlier modification of the *Battle* remedial orders on January 21, 1982.

Therefore, this court has the equitable power to modify the previous orders of this case. However, the orders have only been modified with respect to *time of compliance*. No permanent modification has ever been granted in this action. The court has been careful to use the term indefinite relief due to the recognition that the standard applicable to this case is that characterized by the "totality of circumstances." While *Rhodes* stands for the proposition that populations in excess of the rated capacity cannot be declared *per se* unconstitutional; neither can any set ratio be declared absolutely constitutional.[2] Thus, the determination of constitutional conditions must inherently involve a continuing review of population figures, as one of the multiple relevant factors.[3] The court must stand ready to act should any factor causally swing the balance of the totality of the circumstances past the line separating constitutional from unconstitutional conditions.[4]

Harm to the Petitioner

The harm to the plaintiff class if the stay is not granted could be significant. The court's appointed fact finder testified as a plaintiff witness that (1) the prison system was severely understaffed; (2) it posed significant fire safety dangers; and (3) as recently as days before the hearing of October 4 the system had significant sanitation problems. This testimony was based on recent compliance inspection tours conducted at this court's direction. The most alarm-

ing testimony clearly showed dental, physical, and mental health deficiencies. The fact finder, Mr. John Albach, concluded that in his opinion the prison system had crossed the threshold of unconstitutional conditions given the totality of the circumstances.[5] To permit the addition of more prisoners to such existing prison conditions would seem (to Mr. Albach) only to exacerbate the problems.

While the court would not conclude from the evidence presented that the system has become unconstitutional in its operation, the system is clearly in the state of rapid decline. The system has slipped into the twilight of constitutional compliance and could well slip into its previous unconstitutional condition. Thus the harm that the plaintiffs could suffer is real and potentially significant.

However, the defendants mitigated the impressive factual evidence of the plaintiffs with state officials' sworn assurances of increased staffing, current upgrading of fire standards, and legislative approval of stop-gap spending until the next scheduled legislative assembly. Those significant factors would indeed mitigate the harm suffered by the plaintiff class to an insignificant level. But to remain insignificant, the remedial effects of these measures must be carefully monitored.

Initially this critical monitoring process will consist of the forthcoming Final Compliance Report of Mr. Albach. However, in addition to the recommendations and observations now being compiled in that report, the court directs the fact finder to include suggested reporting techniques that will ensure detailed public statistical information on penal system conditions. While not limited to the below enumerated subjects, the report shall include data for each institution instantaneously depicting the current status of (1) security; (2) medical service availability; (3) mental health service availability; (4) population statistics (*see Ruiz* v. *Estelle*, 666 F.2d 854, 863 (5th Cir. 1982), and (5) outstanding Fire Marshal deficiencies.

Harm to the Respondent

The defendants have the unenviable position of being saddled with the problems of population increases with no resources at its disposal to alleviate the overcrowding. As *Rhodes* noted, "at least three factors influence prison population: the number of arrests, prosecution policies, and sentencing and parole decisions." 452 U.S. at 350 (note 15). These three factors are beyond the control of the defendants of this case.

Nevertheless, while the position of the prison officials is a difficult one in the face of bulging prison populations; the harm suffered by staying specific relief would be measured primarily in administrative difficulties. While the benefit as to administrative flexibility of double bunking the dormitories is great, the actual harm to be suffered in the denial of this option is insignificant. A gratifying benefit of dormitory double bunking is the avoidance of housing state prisoners in poorly equipped and over-populated county jails. Double bunking is certainly better for the housing of the unfortunate.

Harm to the Public Interest

As stated by this court previously and noted by the Court of Appeals in its opinion; "[where the public interests lie] is never an easy question to resolve. It is especially difficult in this type of case, where the plaintiffs' class are generally a feared and despised class." *Battle* v. *Anderson*, 564 F.2d 388, 398 (10th Cir. 1977). However, since the testimony was largely that the prison population is unlikely to become collectively violent due to the order allowing dormitory double bunking, the balance of the public interest must lie in the possibilities for rehabilitation in this relief. The administrative flexibility in placing more inmates in the minimum and medium security institutions by way of dormitory population increases leads to greater rehabilitation possibilities when compared to the alternative

of housing at a higher level of security. This alternative also furthers the continuing penological goal of separation of violent and passive inmates.

The public interest is also against excessive intervention of the federal courts in the administration, control, and maintenance by the state sovereigns of their prison systems. Where as here, the unprecedented growth rate is outstripping good faith attempts at remedial legislation the the state must first be given the opportunity to exercise their ability to correct the situation without judicial interference unless the system is allowed to deteriorate to an unconstitutional level.

In keeping with this policy of sovereign state action, defendants are directed to submit an official penal system policy for the state and a plan of action designed to immediately stop the deterioration of the system to unconstitutional levels. This policy statement and plan of action shall be developed within a reasonable time after the reconvening of the legislature but in any case, no later than May 1, 1983.

Likelihood of the Success of the Petitioner on the Merits

The political climate of the country accurately reflects the legal trend in this country in prison litigation. The chambers opinion of *Atiyeh* v. *Capps*, 449 U.S. 1312 (1981) accurately reflects this situation. After quoting from the District Court's conclusions that

> "overcrowding . . . has increased the health risks to which inmates are exposed; has impinged on the proper delivery of medical and mental health care; has reduced the opportunity for inmates to participate in rehabilitative programs; has resulted in idleness; has produced an atmosphere of tension and fear among inmates and staff; has reduced the ability of the institutions to protect the inmates from assaults; and

> is likely to produce embittered citizens with heightened anti-social attitudes and behavior. 495 F.Supp., at 813"

the Justice made the following comment:

> "In short, nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like. They have been convicted of crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction." 449 U.S. at 1315.

On its face, the Justice would seem to be rejecting the concept of prisoner rights and unconstitutional prison conditions, but as evidenced in *Atiyeh* and the later opinion of *Rhodes* the actual quarrel is with the *sufficiency* of the showing of unconstitutional conditions. The applicable legal standard demands strong empirical evidence upon which to base a conclusion of unconstitutionality. No longer will the mere opinion of an expert be sufficient upon which to base such a finding. Noting the difficulty of factual determination of prison conditions, this court, by agreement of the parties, appointed a fact finder to compile detailed empirical evidence of Oklahoma prison conditions. The fact finder is currently compiling a full report and the court's continued emphasis on statistical public reporting will allow all parties to monitor the conditions of confinement in the Oklahoma prison system.

However, the court does not believe that the evidence presented to date shows a totality of conditions mandating a finding of unconstitutionality. The evidence is clear that this may not be the situation in the near future due to the deterioration of conditions in the penal system but upon the facts now before the court the plaintiff class would seem to the court to have little likelihood of a success on the

merits absent additional statistical evidence. The Eighth Amendment does not forbid prison conditions amounting to punishment of the inmates. The protection it affords is directed against "cruel and unusual" punishment. While Oklahoma's current conditions certainly amount to punishment (albeit harsh), the evidence does not indicate that the level can be fairly classified as "cruel and unusual."

Enjoining Further Population Increases

The issue of whether the court has the jurisdictional power to grant this relief due to the nature of the appeals now pending before the court of appeals need not be reached. In view of the court's ruling above as to the current constitutional operation of the Oklahoma prison system, the court lacks the foundational evidence upon which to issue an injunction against further population increases.

ORDER

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' motion to vacate or stay this court's order of September 27, 1982, be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiffs' emergency motion for the enjoining of further population increases in the Oklahoma prison system be, and the same hereby is, denied.

Although not required, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the above memorandum shall be adopted in lieu of separate findings of fact and conclusions of law and accordingly the court summarizes the incorporated remedial directives in the order below.

Wherefore, the court having this day entered findings of fact and conclusions of law;

IT IS ORDERED that the fact finder shall file with the Clerk of the Court not later than December 1, 1982, a

suggested quarterly reporting procedure that will conform to the guidance issued by the court this day.

IT IS FURTHER ORDERED that the defendants shall file with the Clerk of the Court an official statement of penal policy and detailed plan of action describing measures that will be used to avoid the return of the Oklahoma prison system to unconstitutional conditions and date of compliance with the agreed to stipulations of January 22, 1981. These documents shall be filed within a reasonable time upon the reconvening of the Oklahoma Legislature but not later than May 1, 1983.

The Clerk is requested to mail copies of this Order to all counsel of record.

Dated this *12th* day of October, 1982.

(s) *Luther Bohanon*
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] *See also* II Wright & Miller, *Federal Practice and Procedure*, §2961, pp 604-605 (1973).

[2] While the full extent of the holding of *Rhodes* v. *Chapman* is unclear, it is generally agreed among the courts of appeals that the totality of the circumstances test is the present Eighth Amendment standard. *See Stewart* v. *Winter*, 669 F.2d 328, 335 (5th Cir. 1982).

[3] The plaintiffs raised the issue in their written motion that this court "was without jurisdiction to enter the Order [regarding double bunking] since the issue of overcrowding is currently on appeal." However, this characterization is in error. The only relevant issue on appeal is whether the defendants have an absolute constitutional right to adjust populations in their prisons regardless of court approval. Whether this position is upheld on review or rejected, the decision would have no effect on the order herein at issue. The issue now before this court goes

to the nature of relief this court may grant, not the minimum constitutional standards applicable to prison population.

Action by the Court of Appeals can do no more than liberalize the standards imposed on the state corrections system by this court, and a delay in discharging the duty to modify remedial orders upon change of conditions and law would result in unwarranted administrative interference.

[4] In the Tenth Circuit order issued January 21, 1982, in this case, the court directed the striking of a similar statement. The stricken statement read: "The court finds that when conditions of confinement amount to cruel and unusual punishment, the court shall discharge its duty to protect prisoners' constitutional rights." No guidance was issued as to the reason for this statement deletion from the district court order. This court is of the opinion that the statement was disapproved in context and not in substance. The statement could have been interpreted to be a threat. The statement issued on the heels of a finding of unconstitutional conditions might well have been misunderstood as an invitation to disaster.

This court continues of the opinion that the standard to be used in issuing remedial orders in prison cases is that of constitutional violation resulting in cruel and unusual punishment. As Justice Rehnquist stated in *Atiyeh* v. *Capps*, 449 U.S. 1312, 1318 (1981), "there is likewise no reason for the District Court to stay its hand when specific constitutional violations are called to its attention."

[5] Mr. Albach also testified to serious deficiencies in the exercise, work, food and recreation programs. He additionally noted significant incidences of self mutilations, suicides, and other evidences of severe stress on the system.

83-455

Supreme Court, U.S.
FILED
SEP 1 1983
ALEXANDER L. STEVAS,
CLERK

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 198....

LARRY R. MEACHUM, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

vs.

BOBBY BATTLE, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent/Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

SUPPLEMENTAL APPENDICES

MICHAEL C. TURPEN
Attorney General of Oklahoma

*ROBERT A. NANCE
Assistant Attorney General
Deputy Chief, Federal Division
112 State Capitol Building
Oklahoma City, Oklahoma 73105
Tel. (405) 525-8550

Attorneys for Petitioners

September, 1983

*Counsel of Record

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 19____

LARRY R. MEACHUM, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

VS.

BOBBY BATTLE, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent/Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

---

SUPPLEMENTAL APPENDICES TO PETITION FOR WRIT OF CERTIORARI

INDEX

APPENDIX D:

Opinion of United States Court of Appeals for the Tenth Circuit, filed May 6, 1983.

APPENDIX E:

Order of United States Court of Appeals for the Tenth Circuit denying Petition for Rehearing en banc, filed June 6, 1983.

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 6, 1983]

BOBBY BATTLE, et al., a class action, Plaintiffs-Appellees, Cross-Appellants,	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	Nos. 82-1065
v.	)	82-1379
	)	82-1762
PARK ANDERSON, his successor, RICHARD CRISP, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma, and his successor; J. M. SUNDERLAND, Warden, Oklahoma State Reformatory, Granite, Oklahoma, and his successor; DEPARTMENT OF CORRECTIONS, F. WARREN BENTON, Director, his successor; and the current STATE BOARD OF CORRECTIONS, FRANK E. CAREY, JR., President; LEROY W. KIRK, PATRICIA MONTGOMERY, GARY M. COOK, CHESTER T. CURTIN, SETH MILLINGTON, WILLIAM THOMPSON, as members and their successors, Defendants-Appellants, Cross-Appellees.	)	82-1884 82-2264 82-2325 82-2492

Appeal From the United States District Court
For the Eastern District of Oklahoma
(D.C. No. 72-95-C)

Louis W. Bullock, Tulsa, Oklahoma, for Bobby Battle, et al.

Louise A. Lerner, Attorney, Department of Justice, Washington, D.C. (Wm. Bradford Reynolds, Assistant Attorney General, Walter W. Barnett, Attorney, Department of Justice, Washington, D.C., and Gary L. Richardson, United States Attorney, Oklahoma City, Oklahoma, with her on the brief), for United States of America.

Robert A. Nance, Assistant Attorney General of Oklahoma (Jan Eric Cartwright, Attorney General, and Gloyd L. McCoy, John E. Douglas, Scott J. Silverman, and Elizabeth J. Bradford, Assistant Attorneys General, with him on the briefs), Oklahoma City, Oklahoma, for State of Oklahoma.

Michael Avant-Pybas, Chief Attorney, Oklahoma Department of Corrections, Oklahoma City, Oklahoma, for Oklahoma Department of Corrections.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

PER CURIAM ORDER

The decision of the district court is affirmed. The opinion of this court consists of Parts I and II of Judge Barrett's opinion, in which Judge Doyle and Judge McKay join, and the opinion of Judge McKay, in which Judge Doyle joins.

I

These consolidated cases come to us on appeal as part of a 42 U.S.C.A. § 1983 action initially filed by Bobby Battle (Battle), appearing pro se, in 1972. Before Battle's complaint challenging conditions of confinement was heard, a disastrous riot occurred at the Oklahoma State Penitentiary located at McAlester. In *Battle* v. *Anderson*, 564 F.2d 388 (10th Cir. 1977) we quoted the district court relative to the conditions then prevailing:

> The conditions which precipitated and caused the disastrous riot of 1973 at McAlester now prevail

> throughout the system. In the hearings . . . the court heard the shocking details of the conditions existing prior to the riot and became convinced that the neglect, apathy and deliberate disregard for human decency and rights contributed directly to the tragic loss of lives and $20 million in state property damages. It is now equally clear that the inmate conditions now existing present an immediate and intolerable threat to the safety and security of the inmates, prison personnel and the people of the State of Oklahoma . . . .

564 F.2d at p. 393.

The deteriorated condition of the penal facilities, coupled with a serious problem of overcrowding, was found to constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution. This court affirmed that finding on appeal. Thereafter, the district court pursued a number of compliance hearings in order to assure that the Oklahoma penal institutions would meet constitutional muster. These hearings involved testimony from various penal experts. It was generally conceded by all parties that the overall conditions existing in 1973 were unconstitutional and intolerable. Not only were the prison facilities overcrowded, but these facilities were decadent, filthy, and without proper plumbing or ventilation. Inmates were found to be without meaningful recreation, religious freedom, and access to the courts. The institutions were understaffed and ill-staffed. Prisoners were found to be without adequate medical care.

On May 4, 1979, the State of Oklahoma, through its highest elective and appointive officials, presented to the district court a detailed plan which involved the construction of new penal facilities, modern in design and well equipped. Further, the plan provided for well trained correctional personnel and many additional professionals. Those inmates occupying single cells were to be accorded not less than 60 square feet and those housed in dormi-

tories were to be afforded not less than 75 square feet. Once the State's plan was approved by the district court, the court appointed its fact finder to oversee or audit the degree of progress and compliance with stipulated standards. Tremendous progress has been made by the State of Oklahoma as will be more specifically described hereafter. Suffice to say, the Governor and the State Legislature responded to the crisis with dispatch and outstanding leadership. However, even with the new institutions, and their increased capacity, the tremendous increase in the incidence of crime has resulted in a prison population much in excess of that envisioned under the State's plan. This condition reuired the State to apply to the district court for authority to double cell the inmates.

For convenience, hereafter plaintiffs below, Bobby Battle, *el al,* will be referred to as Battle and defendants below, Park Anderson, *et al,* will be referred to as State of Oklahoma or State.

I.

Nos. 82-1065 and 82-1379

These consolidated appeals challenge certain findings and conclusions in the district court's order of January 12, 1982 (No. 82-1065) as supplemented on January 27, 1982 (No. 82-1379). The relevant undisputed facts will be summarized.

On December 1, 1981, the Oklahoma Department of Corrections (Department), by formal Department resolution, declared that an emergency existed in respect to the housing of inmates within Oklahoma's penal institutions. Within this resolution, the Department requested the Oklahoma Attorney General to petition the district court for modification of existing orders precluding double celling and for permission to temporarily permit double celling in 310 units at four Oklahoma prisons.

On December 9, 1981, in accordance with the Department's request, the Oklahoma Attorney General moved for

immediate Board authority to temporarily double cell "not more than two inmates in not more than 310 cells" located in four Oklahoma prisons, to-wit: Joseph Harp Correctional Center, Lexington Assessment and Reception Center, Conner Correctional Center and Mabel Bassett Correctional Center. This motion was heard on December 22 and 23, 1981.

During the course of the December 23, 1981, hearing, the disitrict court ruled that the State of Oklahoma would be fined $1,000 for each day that inmates were double celled in Oklahoma prisons. Additional hearings on the motion were conducted on December 31, 1981 and January 8, 1982. During the course of the January 8, 1982 hearing, the district court withdrew the $1,000 daily fine for double celling.

On January 12, 1982, the district court entered an order permitting double celling in accordance with the Oklahoma Attorney General's motion at the four specified prisons. In so doing, however, the district court found, *inter alia:* the conditions under which double celling will be effectuated in Oklahoma differ significantly from the conditions which existed in Ohio at the time the Supreme Court of the United States upheld double celling in *Rhodes* v. *Chapman*, 452 U.S. 337 (1981); and, the conditions in the four Oklahoma penal institutions utilizing double celling "will be unconstitutional for a temporary period of time, until double celling is no longer used." On January 27, 1982, the district court supplemented its January 12, 1982 order with additional specific findings relative to incarceration in Oklahoma's penal institutions, *sua sponte*, following an order of this court striking the district court's finding of unconstitutionality by virtue of double celling, *per se*.

On April 6, 1982, the Oklahoma Attorney General filed a motion seeking immediate and permanent relief from the prohibitions against double celling throughout the Oklahoma penal system then housing inmates. On April 23, 1982, the district court ordered:

1. The Court finds and holds that the Defendants should have and do hereby have the authority indefinitely but not permanently to double-cell where necessary. This Court's Order of January 12, 1982, is hereby vacated in part to permit indefinite double-celling throughout the Oklahoma Department of Corrections consistent with constitutional requirements.

It is to be observed that the district court's April 23, 1982, order authorized double celling not only at the initially approved four (4) penal institutions, but throughout the entire Oklahoma penal system on an "indefinite" basis providing that constitutional requirements are met.

On appeal the State of Oklahoma contends: (1) the district court's conclusion that double celling at four of Oklahoma's correctional institutions would be unconstitutional is contrary to law and *Rhodes* v. *Chapman, supra;* (2) the district court's finding that the four Oklahoma facilities at which the Department sought to double cell represented a different situation than that presented in *Rhodes* v. *Chapman, supra,* is clearly erroneous; (3) the $1,000 daily fine imposed by the district court was not a proper exercise of the court's equitable remedial power; and (4) the district court has been too intrusive into the legitimate state activity of prison management. We hold that the State of Oklahoma's appeals must be dismissed as moot. All of the issues presented, however, are addressed in Part III of this opinion, except (3).

28 U.S.C.A. § 1291 provides for appeal only "from the final decisions of the district courts," except where direct appeal to the Supreme Court is provided. *United States* v. *Feeney,* 641 F.2d 821 (10th Cir. 1981). This requirement promotes judicial efficiency and enhances a strong congressional policy against piecemeal reviews and against obstructing or impeding ongoing judicial proceedings. *United States* v. *MacDonald,* 435 U.S. 850 (1978); *United States* v. *Nixon,* 418 U.S. 683 (1974). The courts have the responsi-

bility of determining whether an order is final and therefore appealable. *Century Laminating, Ltd.* v. *Montgomery,* 595 F.2d 563 (10th Cir. 1979), *cert. dismissed,* 444 U.S. 987 (1979).

An appellate court has, of necessity, the discretion to dismiss an appeal when a particular controversy has expired. *Security Bancorp* v. *Board of Governors, etc.,* 655 F.2d 164 (9th Cir. 1981). No appeal is necessary from an order which has been vacated. *Theodoropoulos* v. *Thompson-Starrett Company,* 418 F.2d 350 (2d Cir. 1969), *cert. denied,* 398 U.S. 905 (1970). An appeal from a prior order later vacated by the district court must be dismissed as moot. *Federal Home Loan Bank Board* v. *Long Beach Savings & Loan Association,* 295 F.2d 403 (9th Cir. 1961).

An election to undertake a review of the State of Oklahoma's allegations of error at this juncture would be in direct contravention of *Wiley* v. *National Collegiate Athletic Association,* 612 F.2d 473 (10th Cir. 1979), *cert. denied,* 446 U.S. 943 (1980). We there stated:

> Mootness, like ripeness and standing, has its constitutional origin in the "case or controversy" limitation of Article III which insures that courts exercise their power only in cases where true adversary context allows informed judicial resolution. *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964); *Napier* v. *Gertrude,* 542 F.2d 825, 828 (10th Cir. 1976), *cert. denied,* 429 U.S. 1049, 97 S.Ct. 759, 50 L.Ed. 765 (1977). The actual controversy between the parties "must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973).

612 F.2d at p. 475.

Applying these standards to the facts herein, we hold that the State of Oklahoma's appeal in these consolidated cases must be dismissed as moot. The district court's order

of April 23, 1982 vacated its January 12, 1982 order and afforded the State of Oklahoma the authority to double cell, as necessary, indefinitely throughout the entire Oklahoma penal system. Thus, the State of Oklahoma's allegations of error presented herein are no longer viable. They are, accordingly, moot.

II.

No. 82-1884

In this cross-appeal brought by the Department we are asked to determine the right of the Department to be represented by counsel of its choice inasmuch as the Department's views are not in accord with those of the Oklahoma Attorney General.

On April 16, 1982, in case No. 80-1065, this court entered an order partially remanding that case to the district court for the purpose of specific determinations:

> For determination as to whether the Attorney General of the State of Oklahoma or the Chief Attorney for the Oklahoma Department of Corrections represents the appellants. If both have authority, who is entitled to prevail if their positions are contradictory.

On April 22, 1982, the Oklahoma House of Representatives passed House Resolution No. 1035 which provided:

* * *

> *WHEREAS*, the State has been involved in lengthy litigation in the federal courts of the issue of double celling. . . .
>
> *WHEREAS*, up to the present time the Attorney General, as the Chief Law Officer of the State, has represented the Department of Corrections in such litigation in the federal courts; and
>
> *WHEREAS*, it is the intent of the House of Representatives that the Attorney General continue to rep-

resent the Department of Corrections and the State in the federal courts in the case of *Battle* v. *Anderson*, which pertains to the rights of inmates in state correctional facilities; and

* * *

NOW, THEREFORE, BE IT RESOLVED . . .:

Section 1. The House of Representatives hereby requests that the Attorney General continue to represent the Department of Corrections and the State in the litigation of the case of *Battle* v. *Anderson* currently before the Tenth Circuit Court of Appeals, Docket Number 82-1065.

* * *

On May 20, 1982, the district court entered an order finding, *inter alia*, that: the Attorney General of Oklahoma represents the defendants and has done so for the past ten years; the Department of Corrections has an Oklahoma constitutional right to have counsel represent its interests; and that "[i]n the event the chief attorney for the Oklahoma Department of Corrections chooses to adopt a position contradictory to that of the Attorney General, as a matter of state law, the court finds that the Attorney General's position must prevail."

On appeal the Department contends: (1) the Oklahoma Attorney General does not, as a matter of state law, possess the authority to seek relief contrary to the lawful requests of his clients nor to exercise complete dominion and control over the *Battle* litigation; (2) the Attorney General must follow the code of professional responsibility and recognized ethical standards in the attorney-client relationship with the defendants; and (3) officials who have been sued and are subject to comprehensive remedial orders have a constitutional right to be heard in the federal courts under the due process clause of the Fifth Amendment.

We hold that the district court did not err in finding that the Oklahoma Attorney General represents the defen-

dants herein, including the Oklahoma Department of Corrections, and that the Oklahoma Attorney General's opinion must prevail in the event of a conflict with counsel for the Department. We believe that our holding is in accord with the laws of Oklahoma, particularly, 74 Okl. St. Ann. § 18b, which provides:

> The duties of the Attorney General as the chief law officer of the State shall be:
>
> * * *
>
> (b) To appear for the State and prosecute and defend all actions and proceedings in any of the federal courts in which the State is interested as a party.
>
> (c) To appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board, or officers any cause or proceeding, civil or criminal, in which the State may be a party or interested; and when so appearing in any such cause or proceeding, *he may, if he deems it advisable and to the best interest of the State, take and assume control of the prosecution or defense of the State's interest therein.* [Emphasis supplied].

The statutory position of the Oklahoma Attorney General has been amplified in numerous Oklahoma court decisions. In *State ex rel. Derryberry* v. *Kerr-McGee Corporation*, 516 P.2d 813 (Okl. 1973) the court held:

> The Attorney General, by statute, 74 O.S. 1971 § 18 is the Chief Law Officer of the State. In the absence of explicit legislative or constitutional expression to the contrary, he possesses complete dominion over every litigation in which he properly appears in the interest of the State, whether or not there is a relator or some nominal party. State ex rel. Nesbitt v. District Court of Mayes County, 440 P.2d 700, 707 (Okl. 1967).

> The Attorney General has authority to bring law suits by virtue of 74 O.S. 1971 § 18b and to assume and control the prosecution thereof in the state's best interest. It must logically follow that he has authority to compromise and dismiss the suit.
>
> * * *
>
> As an incident to the dominion the Attorney General possesses over every suit instituted in his official capacity, he has the power to dismiss, abandon, discontinue, or compromise suits brought by him either with or without a stipulation by the other party and to make any disposition of such suits as he deems best for the interest of the state. Lyle v. Luna, 65 N.M. 429, 338 P.2d 1060, 1065 (1959) (dealing with constitutional provision similar to Art. 5 § 53). See also State v. Jones, 252 Ala. 479, 41 So.2d 280, 284 (1949). State v. Finch, 128 Kan. 665, 280 P. 910, 913, 66 A.L.R. 1369 (1929).

516 P.2d at p. 818.

We view the observations in *Wade* v. *Mississippi Cooperative Extension Service*, 392 F. Supp. 229 (N.D. Miss. 1975), interpretive of the authority of the Attorney General of Mississippi, as relevant here:

> We emphasize that this case does not concern the authority which the Board may legally exercise in employing counsel in the discharge of many activities, which may be of a purely local, administrative, or proprietary nature. For example, the Board may need legal assistance in purchasing real estate, collecting debts from others, preparing and reviewing employment contracts with professional staff, and other matters similarly related to the Board's ordinary functions. Whether the Board may engage counsel, independently of the Attorney General's office, to assist in matters of this kind is not presented by this case, and we express no opinion thereon.

> But in actions of indisputable statewide interest, where the Attorney General is specifically empowered to act for state agencies by long-established constitutional doctrine, due regard for Mississippi's Constitution by applying the familiar rule of pari materia interpretation mandates that the Board not be allowed to usurp his constitutional prerogative. See St. Louis & San Francisco R. Co. v. Benton County, 132 Miss. 325, 96 So. 689 (Miss. 1923); State v. Jackson, supra. 392 F.Supp. at p. 235.

In affirming the district court's finding that the Oklahoma Attorney General represents the defendants herein and that his views must prevail when a conflict with Department's counsel surfaces, we reject the Department's argument that such a holding is contrary to *State ex rel. Howard* v. *Oklahoma Corporate Commission,* 614 P.2d 45 (Okl. 1980).

Howard is distinguishable in several significant respects. *Howard* involved a mandamus proceeding in which the Oklahoma Supreme Court exercised its original jurisdiction to consider whether the Oklahoma Corporate [*sic*] Commission could be represented by its own counsel in an action wherein realtors sought to require the Commission to comply with certain statutory provisions which the Attorney General of Oklahoma had, in a formal opinion, declared unconstitutional. In allowing the Commission to be represented by counsel of its choice, the court specifically acknowledged its right and duty to assume original jurisdiction and its "considerable authority over the appearance of counsel, and related matters, implicit from its constitutional grants of authority. . . ." The *Howard* court did acknowledge the Commission's right to be represented by counsel whose views were consonant with its own or who would at least present its interests. However, the court did so within the confines of an original jurisdiction proceeding involving an action to assess the validity of an attorney general's opinion which negated an act of the legis-

lative branch. Such is not the case before us here. In the case at bar, both the Oklahoma Legislature and the Department of Corrections have specifically requested, on numerous occasions, the legal assistance of and representation by the Attorney General. We hold that the district court did not err in finding that the Oklahoma Attorney General represents the defendants and that his position must prevail whenever a conflict arises between the Attorney General and counsel for the Department.

III.

Nos. 82-1762, 82-2264, 82-2325 and 82-2492

The questions for our determination in these consolidated appeals are: (1) Did the district court err and exceed its jurisdiction by its order granting the State of Oklahoma "indefinite" relief from the prohibition of double celling, rather than the "permanent" relief requested by the State of Oklahoma; (2) did the district court exceed its jurisdiction by its order of October 12, 1982, requiring the State of Oklahoma, not later than May 1, 1983, to file a detailed plan whereby the State of Oklahoma would return to single celling and the space limitations stipulated to in January, 1981; (3) did the district court err in placing the burden of proof on *Battle, et al.*, to show that conditions in the Oklahoma prison system are unconstitutional; and (4) did the district court err in denying Battle's request that a "cap" be placed upon the population growth in the Oklahoma prison system.

At an October 31, 1981 hearing the district court described double celling as a "terrible" evil in the same category as "overcrowding" in the whole Oklahoma penal system. [R., Supp. Vol. II, pp. 9-10]. The court did not accept the State's contention that the portion of Oklahoma's penal system then housing inmates met the standards of the Ohio penal facility, which was the subject of *Rhodes* v. *Chapman, supra.* The State requested that the court remove the $1,000 per day sanction imposed for every day that double

celling occurred or until Oklahoma presented a plan with a solution to the end of double celling. The court's special concern with overcrowding was that it led to possible violence and personal encounters, degredation, and a "failure" of sanitation, medical attention, security, food and clothing, and proper housing. [R., Supp. Vol. IV, pp. 14-15]. The court advised the State to have a "remedy" to the problem of "increased populations" at the State's penal institutions come January and February, 1982. [R., Supp. Vol. IV, p. 17]. The court stated that the $1,000 per day fine imposed upon the State for double celling was the result of "their dereliction and negligence in the past." [R., Supp. Vol. IV, p. 24]. The court made it clear that the measure of constitutional compliance was that of meeting American Correctional Association (ACA) standards. [R., Supp. Vol. IV, p. 277].

At a compliance hearing held on December 22, 1981, Governor Nigh, among many others, testified. He stated, *inter alia*: In 1975 the Department of Corrections had 1,214 full time employees (the disastrous riot at McAlester occurred in 1973, resulting in tragic loss of lives and some $20 million in property damage), and today that number is 2,802, including specialized employees at the mental health institution and Western State; the Oklahoma Correctional System is the first major correctional system to be fully accredited by the ACA; as Governor, he has set a goal to have every Oklahoma penal institution fully accredited; in 1975 the operational budget of the Department was $11,961,000, and that same year capital outlay was $4,341,000; including the appropriations recommended by the Governor for 1983, coupled with 1982 appropriations, the State had expended, for operations alone, the sum of $338,782,922 since 1975; in 1975 the operational budget was $11,961,000 and in 1983 the operational budget will exceed $70,000,000; since 1975, capital outlays have amounted to $91,706,982; from 1975 to 1983, the operational budget has increased 565%; the State has made tremendous strides with great

response from the Legislature; the tremendous increase in crimes has placed the State's prison population as estimated under the State's plan much out of kilter, creating a "different situation." [R., Supp. Vol. III, pp. 27-29].

In 1982, some 304 replacement beds became available in the newly constructed inmate housing area at the Oklahoma State Penitentiary at McAlester. In addition extensive renovation, in accordance with the district court's orders, will likely be completed in Cellhouse F of the McAlester facility in November, 1983. A new housing unit was added in 1978 to the McLeod Correctional Center at Farris, Oklahoma, originally intended to house 91 inmates, of whom 86 were to occupy general population cells and 5 to occupy disciplinary cells. New housing units at the Ouachita Correctional Center as of 1982 house approximately 178 inmates. In 1980 the new Jess Dunn Correctional Center was opened at Taft, Oklahoma, with a design capacity of 305 inmates. The James Crabtree Correctional Center at Helena, Oklahoma, is being renovated and by 1984 should house some 300 inmates. The women's prison at Mabel Bassett Correctional Center in Oklahoma City, opened in 1973 with a designed capacity of 110, has additional new housing units of 65 completed in 1982 and an additional 65-cell housing unit is expected to be completed in May, 1983. The Joseph Harp Correctional Center at Lexington was opened in 1978 with a designed capacity of 414 cells and some additional 80 cells are expected to be completed by August, 1983. The Lexington Correctional Center was also opened in 1978 with a two-part design capacity of some 430 cells, and about 180 additional cell units are expected to be completed in July of 1983. The Conner Correctional Center at Hominy, Oklahoma, was opened in 1979, with a design capacity of 430 cells. An additional 80 cells are expected to be completed in August, 1983.

The problem of prison overcrowding surfaced again in Oklahoma at least as early as 1979, the result of the sharp

increase in the incidence of crime and criminal convictions. The situation dictated that certain convicts be retained in Oklahoma's county jails because the State's penal system was overcrowded. The district court found that the Oklahoma Legislature enacted resolutions to require the removal of the convicted prisoners from the overcrowded county jails into the overcrowded state penal system and that these resolutions "afforded no directions nor methods to depopulate or otherwise solve the overcrowding problem, but rather burdened the Oklahoma Department of Corrections with solving the problem, without extra authority and money. *This was a shabby way to treat the Department of Corrections and the members of the Board of Corrections.*" [Emphasis supplied]. [R., Supp. Vol. I, *Findings and Order of January 12, 1982*, p. 68]. The court proceeded to find that because of this "shabby" treatment, the Department was placed in the untenable position of requesting the Oklahoma Attorney General to petition the district court for permission to double cell. The court did not find *Rhodes* v. *Chapman, supra*, controlling. The court reluctantly modified its order of May 4, 1979, and other orders which had limited one prisoner to a cell after finding that the conditions (double celling) at the four penal institutions "will be unconstitutional for a temporary period of time." The Department was authorized to double cell in not more than 310 cells in the four institutions until December 22, 1982, unless further extended by the court. [R., Supp. Vol. I, p. 70].

On January 21, 1982, Battle and United States moved for further evidentiary hearing on the issue of the court's orders of 1977, 1978 and 1979 regarding overcrowding. The court, following a pretrial conference on February 5, 1982, scheduled a submission of information on the overcrowding issue to be filed by the parties not later than March 1, 1982. Various depositions were filed, together with photographic exhibits. Evidentiary hearings were held on March 8 and 9, 1982, and cluminated with a detailed hearing held

on Battle's "Motion to Vacate or Order Stay of Implementation" of the trial court's prior order authorizing double celling and request that the court place a cap on the number of prisoners who can be incarcerated within the Oklahoma prison system. The court had before it a report from the district court's selected Finder of Facts, Mr. John Albach and a letter-report from Mr. Larry Meachum, Director of the Department of Corrections.

On October 4, 1982, the district court conducted a detailed hearing. The court stated that it considered this case as one of equity whereby the court was required to do what is "right" between the parties in the area of operation of the Oklahoma penal system within constitutional limits. [R., Vol. II, p. 3]. The court, of course, noted that the Oklahoma penal system was overcrowded. The court observed that the Legislature has appropriated thousands of dollars and "I want to hear this morning evidence showing a non-compliance with constitutional requirements if there are any and whatever they are." [R., Vol. II, p. 4].

The court found from the evidence that, with respect to those facilities within Oklahoma's penal sytsem housing inmates, there exists no: improper clothing, improper bedding, improper coldness, improper food, improper hygiene, improper medication, improper medical care, or improper segregation. The court stated that there had been some periodical reports of some improper segregation and some question about improper access to the court. There were no findings in that regard, however. Our review of the record leads us to observe, as the trial court found, that the physical facilities used to house inmates are excellent. The detailed photographic exhibits evidence this.

They are, in my review, so modern, so spacious and so extensive as to be not only fit but most comfortable for prisoners. The facilities in use are new, light, modern and accommodating. The recreational facilities are extensive, modern and spruce; the dormitories are new, clean and

comfortable; library facilities are modern, complete and convenient; washing, bathing and toilet facilities are modern, clean and spacious; kitchens are modern, well equipped and clean; dining facilities are new, attractive and comfortable; medical and dental facilities are extensive, modern and well equipped; training shops are modern and well equipped; classrooms are modern, clean and comfortable; chapels are modern, beautiful and convenient; barber shop facilities are extremely modern, well equipped and comfortable. Personal property and equipment is new, and attractive. All in all, these correctional facilities being used to house inmates are anything but penal in a punishment sense. The State of Oklahoma has, in my view, traveled that "extra mile" to provide its prisoners with every chance and opportunity to rehabilitate their lives. Their facilities and surroundings are outstanding. The trial court said it well: "The Court finds from the record . . . that the State of Oklahoma has appropriated substantial sums of money for the operation of the prisons and appropriated substantial sums of money (approximately $93 million) to build new prisons, *but the crime rate in the State of Oklahoma has grown so fast that the building of new prison cells or prison buildings . . . to take care of one man, one cell, it has just been impossible to do.*" [Emphasis supplied]. (R., Vol. II, p. 6]. The trial court further observed that the growing prison population is a direct result of more crimes, more trials and more convictions, which has created the need for double celling.

Mr. Bullock, counsel for Battle, viewed the present prison system in Oklahoma as one in such a deteriorating state that it is a "system in crisis". [R., Vol. II, p. 13]. He contended that his clients (the incarcerated prisoners) should not have to wait until the court's conscience is again shocked by the

> "way human beings are being treated in the Oklahoma Prison System. We have a right in equity to have past harms avoided in the future. We shouldn't be

made to sit and subject ourselves to repetition of conditions that we've seen before and wait until that date for this court to intercept the deterioration."

[R., Vol. II, p. 13]. It was on that premise that Battle, *et al.*, opposed double celling and urged the court, if necessary, to "put a lock on the door to allow no more increases in this population until specific units are brought on line to fully acquaint us with all the problems of this system." [R., Vol. II, p. 14]. While the trial court did not accept Battle's contentions that double celling should cease on constitutional grounds and that a "cap" should be placed on the number of prisoners to be incarcertated in the Oklahoma Prison System, the court was nevertheless convinced that the situation with regard to overcrowding did place the system in the "twilight" of constitutional compliance. This observation was, of course, predicated on increased prison population. It is my view that increased prison populaiton, in and of itself, should not place Oklahoma's prison system in a "twilight" zone of constitutional compliance except when measured against the trial court's initial order requiring one man per cell with a minimum of 60 square feet per cell and those housed in dormitories to be afforded not less than 75 square feet. This is the *only* basis on which the court could have predicated its "twilight" observation, simply because there do not now exist *any* unconstitutional conditions in the Oklahoma Prison System. The trial court so found.

Counsel for Battle contends that the trial court erred by casting the burden on the plaintiffs to demonstrate the existence of unconstitutional conditions within the Oklahoma Prison System. To do so, said Mr. Bullock, would render the victory the plaintiffs have fought so hard to win a "hollow one." The burden, as Mr. Bullock sees it, is that of the State of Oklahoma to recognize that the system is already deteriorating and that action is required now to assure that the "plan" adopted by the State of Oklahoma to upgrade the system following the 1973 riot, based upon

the totality of adverse conditions prevailing in the system, must, at all times, without excuse, be abided. In order to enforce this obligation, counsel for Battle insists that it is the duty of the State of Oklahoma to expeditiously appropriate all necessary funds and proceed on an emergency basis to construct new prison facilities to accommodate the prisoners, regardless of costs and adverse impact on other State obligations.

In the course of the April 23, 1982, evidentiary hearing, the State of Oklahoma submitted an affidavit of Superintendent Ronald C. Marshall of the Southern Ohio Correctional Facility at Lucasville, Ohio, which was admitted. Superintendent Marshall is chief administrator of the Ohio correctional facility which was the subject of *Rhodes* v. *Chapman, supra,* which, for convenience shall hereafter be simply referred to as *Rhodes.* He testified that he had personally examined the Oklahoma correctional facilities in use, and, without exception, found that those facilities met or exceeded the standards of his Ohio institution, which, of course, is the prison facility wherein the Supreme Court approved double celling. Superintendent Marshall stated that: inmates in the Oklahoma institutions had as much freedom outside of their cells as did the prisoners at his facility; the Oklahoma inmates had more freedom to pass in and out of their cells than inmates at his facility; the Oklahoma facilities were freer of pests and vermin compared to his facility; the size of the cells in the Oklahoma facilities equalled those at his facility, approved by the Supreme Court in *Rhodes;* the recreational facilities, chapels, medical facilities, commissary or canteen facilities, and industrial or job training opportunities, equalled or exceeded those existing in his institution when double celling was approved in *Rhodes.* In detailed account, Superintendent Marshall further testified in open court at the April 23, 1982, hearing. In summary, he found the Oklahoma facilities housing inmates and their operation were very adequate, well managed and well staffed.

It is on this note that I now turn my attention to the extent that *Rhodes* controls the disposition of this appeal. I have carefully reviewed that opinion, keeping in mind that the evidence in this record demonstrates, beyond dispute, that the Oklahoma correctional facilities housing inmates, the subject of this case, equal or exceed the Ohio penal facility which was the subject of *Rhodes*, in physical structure, equipment, utilities, and staff personnel. Superintendent Marshall's testimony lends credence to the proposition that Oklahoma's facilities excel the Ohio facility.

The plaintiffs in *Rhodes* were double celled, and the genesis of their § 1983 suit, alleging a violation of the Eighth Amendment, was the overcrowded condition of the facility, a maximum security prison. They sought injunctive relief for non-temporary double celling. The district court found the institution, constructed in the early 1970's, to be first class. The conditions, physical and staff-wise, were comparable but certainly not better than those at the Oklahoma correctional facilities involved in the instant case. The Ohio institution had 1,620 cells averaging 63 square feet of floor space. Only about 350 of the cells were single occupancy at the time of trial, while approximately 1,270 were double celled. The prison held 2,300 prisoners, placing the facility at 138% of capacity. About 75% of the inmates spent a considerable time beyond their cells. The district court found only medical care and dental care to be inadequate, but by no means unconstitutional. The district court, within this context, analyzed the Eighth Amendment challenge, first applying a "totality of conditions" approach and thereafter the "shock the conscience" of the court test. This analysis led the district court to find that the conditions at the Ohio facility did constitute cruel and unusual punishment prohibited by the Eighth Amendment. The district court relied, as did the district court in *Battle*, upon a variety of expert correctional standards in so finding, particularly: (a) the facility was confining some 38% more inmates than it was designed for; (b) the cells were de-

signed for single occupancy, (c) most of the inmates spent more time in their cells with cellmates than outside, and (d) the practice of double celling was not temporary. On appeal, the Court of Appeals for the Sixth Circuit affirmed, upholding the district court's application of the "totality of the conditions" approach, *Chapman* v. *Rhodes*, 624 F.2d 1099 (6th Cir. 1980). The Supreme Court granted the State of Ohio's petition for certiorari.

The Supreme Court in its *Rhodes* opinion recognized the diverse standards applied by lower courts in determining the existence of Eighth Amendment cruel and unusual punishment involved in prison overcrowding cases. Justice Powell, writing for the majority (Justice Powell was joined by Chief Justice Burger, and Justices Stewart, White and Rehnquist) attempted, in my view, to state clear principles to be followed in evaluating Eighth Amendment contentions involved in conditions of penal confinement. Justice Powell reviewed the evaluation of Eighth Amendment applications commencing with the prohibition against barbarous penal punishment and continuing to the modern, broad interpretations which reach non-physical punishment. Justice Powell, for the majority, cited *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (deprivation of contemporary standards of decency, there involving deliberate indifference to inmates' serious medical needs) and *Hutto* v. *Finney*, 437 U.S. 678 (1978) (totality of conditions approach, there specifically involving conditions of solitary confinement) and stated that prison conditions can be viewed alone or in combination when evaluating cruel and unusual punishment claims. Thus, the majority did recognize the validity of a "totality of the conditions of confinement" approach to cruel and unusual punishment issues. However, and most significantly here, Justice Powell, for the majority, held that the conditions creating cruel and unusual punishment must meet the measure of one of these three queries: (a) is the punishment "grossly disproportionate to the severity of the crime" warranting punishment, (b) do the conditions in-

volve "the wanton and unnecessary infliction of pain", or (c) do the conditions deprive "inmates of the minimal civilized measures of life's necessities." 452 U.S. at p. 347. My analysis of *Rhodes* corresponds with that set forth in *Smith* v. *Fairman*, 32 Cr. L. 2084 (7th Cir., 10/5/82) which reversed a district court's finding of cruel and unusual punishment in double-celling at the Illinois Pontiac maximum security penitentiary.

The majority in *Rhodes* held that the five bases relied upon by the district court were insufficient to prove an Eighth Amendment violation. The majority specifically observed that the record did not evidence conditions proving that unnecessary or wanton *pain* was inflicted on the Ohio inmates or that the punishment was disproportionate to the crimes committed. It is significant, I believe, that the Court placed less weight on the opinions of experts and standards promulgated by correctional agencies than upon the public attitude. In dictum, this emphasis was explained. The *Rhodes* majority observed that harsh or restrictive conditions of confinement are part of the punishment criminal offenders justly receive because the Constitution does not mandate comfortable prisons. Justice Powell wrote that "To the extent that such conditions [of confinement] are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." 452 U.S. at p. 347. The majority did recognize, of course, that where old, deteriorated, deplorable facilities with attendant sordid conditions of existence prevail, federal courts should scrutinize Eighth Amendment contentions. That, we suggest, is precisely the scenario which confronted the conscientious trial judge in the initial *Battle* litigation following the disastrous riot of 1973. Such is not the case now.

Justice Brennan, joined in his concurring opinion by Justices Blackmun and Stevens, agreed with the majority's first test of Eighth Amendment violations, *i.e.*, an evaluation of the totality of the conditions upon the prisoners. Justice Brennan departed from the majority in the appli-

cation of the second test. In lieu, he would inquire whether the conditions comport with human dignity based on contemporary standards, predicated primarily on the evidence adduced from various experts. Even so, Justice Brennan, while acknowledging that prison overcrowding and double celling may sometimes result in serious harm to prisoners, nevertheless stated that the record relative to the Ohio facility did not establish cruel and unusual punishment aspects of confinement.

Mr. Justice Marshall, the lone dissenter in *Rhodes*, would require a standard much akin to that urged by Mr. Bullock, counsel for Battle. He would require, under a totality of conditions test, that penal facilities meet the measure of norms of decency recognizing the dignity of man, measured by correctional standards and expert testimony. He did not favor double celling, observing that the voters and the Ohio Legislature had not approved double celling and in fact had constructed the Ohio facility for single celling only.

Thus, a clear majority in *Rhodes* came down with applicable standards substantially designed to weigh the conditions of confinement against the backdrop that those criminally convicted and incarcerated are in fact imprisoned to be punished and that only that punishment "grossly disproportionate to the severity of the crime", coupled with other considered criteria, may meet the Eighth Amendment measure.

Perhaps more pertinent here, the *Rhodes* majority observed that state legislatures and state prison officials can properly weigh considerations affecting the adequacy of prisons because they are sensitive to the dictates of the Constitution, the problem involving just punishment, deterrence of future crime, and the promotion of rehabilitation. On this predicate, the Court cautioned lower federal courts to avoid over-zealous design in granting relief to prisoners. The *Rhodes* opinion, in my view, is a clear sig-

nal that the federal judiciary should, absent inaction by state courts, legislatures and executive officials where dire circumstances exist, such as those found in the Oklahoma penal system in 1972-1973, practice a hands-off policy.

The district court has retained jurisdiction under its general power to do equity, founded in its reliance on the need to continually "audit" the injunctive relief ordered. The propriety of continuing jurisdiction is anchored to the holding set forth in *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953). *Grant* was an antitrust case. The Court held that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case unless the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated.

In my view, the dictates of *Rhodes*, cautioning lower federal courts to pursue a "hands off" policy relative to Eighth Amendment claims involving state prisons, apply, unless the circumstances are such that the State of Oklahoma through its executive, legislative and judicial brances permits Eighth Amendment violations to persist in the Oklahoma penal system. This would be the only need for federal court intervention and continuing supervision pursuant to the equitable power of the district court recognized in *United States* v. *W. T. Grant Co.*, *supra*.

We recognize, for the benefit of counsel, that briefing in *Case No. 82-2325* has been permitted, to some extent, by our prior orders. We further observe that the cross-appeal by the Department to Battle's appeal in *Case No. 82-2492* has not yet been briefed. The court has been adequately informed of the merits of the issues there presented and has heretofore effectively decided them. Thus no further briefing is necessary.

In light of the non-existence of constitutional deficiencies in the Eighth Amendment "cruel and unusual" context presently within the Oklahoma penal system, I would

hold that the conscientious district court erred in retaining jurisdiction in this case by ordering the State of Oklahoma to file an official statement of penal policy and a detailed plan of action not later than May 1, 1983, describing those measures designed to avoid the return to the Oklahoma prison system of unconstitutional conditions, and to demonstrate those steps to be taken whereby the State would return to single celling and space limitations stipulated to in January, 1981.

Nos. 82-1065, 82-1379, 82-1762, 82-1884, 82-2264, 82-2325, and 82-2492 — BOBBY BATTLE, et al. v. PARK ANDERSON, et al.

McKAY, Circuit Judge, with whom DOYLE, Circuit Judge, joins:

We concur in parts I and II of Judge Barrett's opinion. We write separately to state our disagreement with his resolution of an issue encountered in part III, the question of the district court's continuing authority to prevent a recurrence of the shocking, inhumane, and unconstitutional conditions that previously prevailed in the Oklahoma prisons.[1]

I

In recent years, state indifference and inaction has forced the federal courts to intervene in the operation of state prison systems and engage in broad scale reform to

---

[1] In a past episode of this case, the district court determined that conditions in the Oklahoma prison system violated the eighth amendment's proscription of cruel and unusual punishment. *See* Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974). Since that time, the district court has engaged in a continuing struggle to remedy the constitutional violations. *See* Battle v. Anderson, 447 F. Supp. 516 (E.D. Okla.), *aff'd*, 564 F.2d 388 (10th Cir. 1977), Battle v. Anderson, 457 F. Supp. 719 (E.D. Okla. 1978), *remanded for further hearings*, 594 F.2d 786 (10th Cir. 1979).

remedy unconstitutional conditions. *See Rhodes* v. *Chapman*, 452 U.S. 337, 353-61 (1981) (Brennan, J., concurring) (describing attempts by the federal courts to correct eighth amendment violations). *See generally*, Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 Harv. L. Rev. 626 (1981). In some cases, the courts have perhaps overstepped their authority and given insufficient credit to the state's sensitivity to constitutional values. *See Rhodes*, 452 U.S. at 352; *cf. Hewitt* v. *Helms*, 51 U.S.L.W. 4124, 4125 (U.S. Feb. 22, 1983) (prison officials accorded great deference in prison management). In other cases, blatant state disregard for constitutional rights has forced even cautious and reluctant courts to intervene. *Rhodes*, 452 U.S. at 354, (Brennan, J., concurring); *see, e.g., Pugh* v. *Locke*, 406 F.Supp. 318, 328 (M.D. Ala. 1976), *aff'd as modified sub. nom. Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds sub nom. Alabama* v. *Pugh*, 438 U.S. 781 (1978) (per curiam).

All the members of this panel agree that past conditions in the Oklahoma prisons constituted a systemic violation by Oklahoma of the eighth amendment proscription against cruel and unusual punishment. Indeed, Judge Barrett explicitly recognizes " 'the neglect, apathy and deliberate disregard for human decency and rights' " that pervaded the Oklahoma prisons in the past. *Ante* at 3 (quoting *Battle* v. *Anderson*, 564 F.2d 388, 393 (10th Cir. 1977)). Likewise, the members of this panel, as well as the district court, all agree that Oklahoma has made significant progress in amelioration the disgraceful prison conditions of the past. In this regard, Judge Barrett finds that the State of Oklahoma has eliminated these conditions and has provided facilities that are "so modern, so spacious and so extensive as to be not only fit but most comfortable for prisoners." *Ante* at 20. While we do not commend the present facilities so strongly, we nevertheless agree that present conditions, as described by the district court, appear constitutionally adequate under the standards set forth in *Rhodes*.

We diverge from Judge Barrett, however, on the question of the district court's continuing jurisdiction over the Oklahoma prison system. Finding no present constitutional violation, he believes that the district court should terminate its jurisdiction. In contrast, we believe that a court should exercise supervisory power over the suit until it can say with assurance not only that eighth amendment violations do not presently exist but that there is no reasonable expectation that unconstitutional conditions will recur.

II

In reaching our conclusion, we note at the outset the special character of this litigation. This suit is not intended to resolve some narrow, discrete dispute between Messrs. Anderson and Battle; instead, it involves an intervention in the operation of a state institution to eliminate unconstitutional practices, an intervention that commentators have described as "structural reform." Fiss, *Forward: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979); *see*, Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376 (1982); Chayes, *Forward: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4 (1982). As Professor Fiss has perceptively stated,

> the focus of structural reform is not upon particular incidents or transactions, but rather upon the conditions of social life and the role that large-scale organizations play in determining those conditions. What is critical is not the black child turned away at the door of the white school, or the individual act of police brutality. These incidents may have triggered the lawsuit. They may also be of evidentiary significance: evidence of a "pattern or practice" of racism or lawlessness. But the ultimate subject matter of the lawsuit or focus of the judicial inquiry is not these incidents, these particularized and discrete events, but rather a social condition that threatens important

> constitutional values and the organizational dynamic that creates and perpetuates that condition.

Fiss, 93 Harv. L. Rev. at 18 (footnote omitted).

In such cases the courts intervene, not simply to prevent isolated instances of misconduct, but rather to remove a threat to constitutional values posed by the manner of operation of the institution. Fiss, 93 Harv. L. Rev. at 22-23; *see Estelle* v. *Gamble*, 429 U.S. 97, 116-17 n.13 (1976) (Stevens, J., dissenting). Accordingly, the court's remedies must be designed to achieve lasting institutional change. Fiss, 93 Harv. L. Rev. at 28.[2] The court's remedies typically take the form of prospective injunctions supported by continuing oversight to assure compliance. As Professor Fiss has noted, the remedial phase often extends well into the future, requiring the court to exercise continuing jurisdiction:

> It involves a long, continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself. The task is not to declare who is right or who is wrong, not to calculate the amount of damages or to formulate a decree designed to stop some discrete act. The task is to remove the condition that threatens the constitutional values. . . . [T]he remedy involves the court in nothing less than the reorganization of an ongoing institution, so as to remove the threat it poses to con-

---

[2] *See generally*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784 (1978); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 Harv. L. Rev. 626 (1981); Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 Yale L. J. 1338 (1975).

stitutional values. The court's jurisdiction will last as long as the threat persists.

Fiss, 93 Harv. L. Rev. at 27-28; *see* Special Project, 78 Colum. L. Rev. at 816-17, 842-44.

We believe that the court, in exercising continuing jurisdiction to achieve structural reform, cannot terminate its jurisdiction until it has eliminated the constitutional violation "root and branch." *See Green* v. *County School Board*, 391 U.S. 430, 438 (1968).[3] The court must exercise supervisory power over the matter until it can say with assurance that the unconstitutional practices have been discontinued and that there is no reasonable expectation that unconstitutional practices will recur.

The concept that a court's jurisdiction extends beyond the termination of the wrongdoing is not a novel idea; rather, it is based on traditional notions of the courts' equitable powers.[4] Moreover, a court's retention of jurisdiction beyond the point of compliance with its injunctions is not a novel practice. In past prison cases, courts have retained jurisdiction beyond the terms of the injunction "to

---

[3] In *Green*, a classic example of structural reform of segregated schools, the Court stated that "the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." 391 U.S. at 439; *accord*, Raney v. Board of Educ., 391 U.S. 443, 449 (1968); *see also* Brown v. Board of Educ., 349 U.S. 294, 301 (1954) (district court to retain jurisdiction during "period of transition" to desegregated schools).

[4] It has long been settled that the court's power to grant injunctive relief survives discontinuance of the illegal conduct. *E.g.*, United States v. W. T. Grant Co., 345 U.S. 629, 633 (1952). In this regard, the Supreme Court has noted that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952). More recently, the Court has pointed out that "abandonment is an important factor bearing on the question

make it reasonably certain that the changes of methods and practices will not be abandoned, forgotten, or neglected, but have become permanently established." *Jones* v. *Wittenberg*, 330 F.Supp. 707, 721 (N.D. Ohio 1971), *aff'd sub nom. Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972); *see Taylor* v. *Perini*, 413 F. Supp. 189, 197 (N.D. Ohio 1976); *see also*, Special Project, 78 Colum. L. Rev. at 842-43 ("The permanent achievement of remedial *objectives*, rather than full implementation of the changes ordered in the decree, therefore, appears to be the outermost limit of judicial intervention.") (footnote omitted).

Future prison conditions are an outgrowth of present attitudes. The factual findings of the district court suggest that present attitudes in Oklahoma may well contain seeds from the past. The court found that past unconstitutional conditions threatened to recur, stating,

> while the Court would not conclude from the evidence presented that the system has become unconstitutional in its operation, the system is clearly in the state of

---

[4] (Continued)

whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the *exercise rather than the existence of judicial power.*" City of Mesquite v. Aladdin's Castle, Inc., ___ U.S. ___, 102 S.Ct. 1070, 1074 (1982) (footnote omitted; emphasis added).

These principles apply with equal force once a court has intervened and provided prospective injunctive relief. If an injunction is to be effective, a court must retain continuing jurisdiction to enforce and modify the terms of its orders. *See* Hutto v. Finney, 437 U.S. 678, 691 (1978); System Fed'n No. 91 Ry. Employes' Dep't v. Wright, 364 U.S. 642 (1961); United States v. Swift & Co., 286 U.S. 106 (1932). *See generally*, O. Fiss, The Civil Rights Injunction (1978). The court cannot be divested of jurisdiction by temporary compliance with the injunction. As in the case of pretrial abandonment, *see* County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), a court must retain jurisdiction until it can say with assurance that there is no reasonable expectation that the unlawful activity will recur.

> rapid decline. The system has slipped into the twilight of constitutional compliance and could well slip into its previous unconstitutional condition.

Battle v. *Anderson*, No. 72-95-CIV, mem. op. at 3-14 (E.D. Okla. Oct. 12, 1982). The record provides strong support for the district court's factual finding of a rapid decline in prison conditions. In a hearing preceding the court's decision, the court-appointed fact finder testified that the prisons were overcrowded, understaffed, and posed significant fire, safety, sanitation, and health hazards. He also noted serious deficiencies in the exercise, work, food, and recreation programs as well as self-multilations and suicides. Indeed, he testified that in his opinion the prison system had already crossed the threshold of unconstitutional conditions, given the totality of the circumstances.

In light of its fully supported factual findings, the district court correctly chose to exercise continuing jurisdiction in this controversy. Present compliance is insufficient to bring an end to this litigation if the compliance is simply a transient excursion above the constitutional threshold. The district court has not only the authority but an obligation to prevent a regression of the Oklahoma prison system to the unconstitutional conditions of the past. When a prison system deteriorates to the point that a federal district court must step in to rectify unconstitutional conditions, the court should retain jurisdiction until it is satisfied that the unconstitutional conditions will not recur.

While we conclude that the district court retains jurisdiction over the Oklahoma prison system, we also recognize limits to the scope of this jurisdiction. These limits are defined by the purpose of the continuing jurisdiction — to assure that the court's intervention has achieved lasting institutional reform. Accordingly, the court may exercise continuing jurisdiction over the Oklahoma prison system to the extent necessary to assure that eighth amendment violations will not recur.

The exercise of this jurisdiction must be entrusted to the discretion of the district court. Indeed, it "is the only court equipped to test evidentiary compliance and the only forum in which to raise any allegations of continuing deficiencies." *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 215 (8th Cir. 1974). Absent a conclusion that the district court has made clearly erroneous factual findings or has abused its discretion, we have no authority to overturn its determination of the need for continuing jurisdiction. In this case the district court has amply demonstrated the need for continuing jurisdiction. Furthermore, the district court has demonstrated a clear understanding of the scope of its supervisory powers. The court stated as follows:

> The court has been careful to use the term indefinite relief due to the recognition that the standard applicable to this case is that characterized by the "totality of circumstances." While *Rhodes* stands for the proposition that populations in excess of the rated capacity cannot be declared *per se* unconstitutional; neither can any set ratio be declared absolutely constitutional. Thus, the determination of constitutional conditions must inherently involve a continuing review of population figures, as one of the multiple relevant factors. The court must stand ready to act should any factor causally swing the balance of the totality of the circumstances past the line separating constitutional from unconstitutional conditions.

Battle v. *Anderson*, No. 72-95-CIV, mem. op. at 3 (Oct. 12, 1982) (footnotes omitted). The court's order, made pursuant to its exercise of continuing jurisdiction, provides in pertinent part that

> the defendants shall file with the Clerk of the Court an official statement of penal policy and detailed plan of action describing measures that will be used to avoid the return of the Oklahoma prison system to unconstitutional conditions and date of compliance with the agreed to stipulations of January 22, 1981.

Id. at 8. The court order is limited in scope and is targeted to assure compliance with past decrees and to prevent a recurrence of unconstitutional conditions.[5] Accordingly, it should be affirmed in full.[6]

---

[5] The stipulations of January 22, 1981, with which the order requires eventual compliance, include provisions for single-celling and specific space requirements. As the district court recognizes, these provisions may be adjusted in the future in light of the totality of the circumstances without compromising constitutional standards. *See Rhodes*, 452 U.S. 337. Given the state of declining prison conditions, the court acted properly in retaining, for the present, the obligation of eventual compliance.

[6] We commend Judge Bohanon for the skill and fortitude exercised over the past ten years in administering this difficult and demanding case.

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

June 6, 1985 [*sic*]

Mr. Louis W. Bullock
Mr. Carl G. Stevens
Sobel, Bullock & Stevens
717 So. Houston, #404
Tulsa, OK 74127

Mr. Michael Avant-Pybas
Chief Attorney
Department of Corrections
3400 North Eastern Avenue
P.O. Box 11400
Oklahoma City, OK 73111

Ms. Louise A. Lerner
Mr. William Bradford Reynolds
U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

Mr. Gary L. Richardson
U.S. Attorney
P.O. Box 1009
Muskogee, OK 74401

Mr. Michael C. Turpen
Attorney General
Mr. Robert A. Nance,
Mr. Gloyd L. McCoy
Mr. John E. Douglas
Mr. Scott J. Silverman
Ms. Elizabeth J. Bradford
Mr. Charles S. Rogers
Assistant Attorneys General
112 State Capitol Bldg.
Oklahoma City, OK 73105

Mr. James A. Kirk
Kirk and Chaney
135 Robert S. Kerr, #1300
Oklahoma City, OK 73102

Re: Nos. 82-1065, 82-1379, 82-1762, 82-1884, 82-2264, 82-2325, 82-2492; Battle, et al. vs. Park Anderson, et al.

Dear Counsel:

The enclosed order was entered today in the captioned cause.

Very truly yours,
HOWARD K. PHILLIPS, Clerk

MAY TERM — June 6, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

BOBBY BATTLE, et al., a class action,	)	
Plaintiffs-Appellees, Cross-Appellants,	)	Nos. 82-1065
	)	82-1379
	)	82-1762
UNITED STATES OF AMERICA,	)	82-1884
Plaintiff-Intervenor,	)	82-2264
vs.	)	82-2325
	)	82-2492
PARK ANDERSON, etc., et al.,	)	
Defendants-Appellants, Cross-Appellees.	)	

This matter comes on for consideration of appellants' (Anderson, et al.) suggestion for rehearing in banc.

Upon consideration whereof, the Court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, rehearing in banc is denied.

Circuit Judges Seth and Barrett voted to grant rehearing in banc.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk